COURT DECISIONS

FEDERAL TRADE COMMISSION

VOLUME XVI

January 1, 1982 to December 31, 1982

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PREFACE

COURT DECISIONS—FEDERAL TRADE COMMISSION (1982) is the sixteenth volume of a series of publications setting forth the text of the majority of cases instituted against or by the Federal Trade Commission in the Federal courts.

This edition contains a cumulative table of cases beginning with 1976. The table of cases from 1914 through 1975 can be found in Volume IX of Statutes and Court Decisions.

The bracketed, boldface figures in the text of cases reported by the National Reporter series and the Supreme Court cases reflect the page numbers of the official reporter.

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*Abbreviated as follows:

BPA	Back Pay Act
CRA	Civil Rights Act
CA	Clayton Act
ECOA	Equal Credit Opportunity Act
EEOA	Equal Employment Opportunity Act
FCRA	Fair Credit Reporting Act
FDCPA	Fair Debt Collection Practices Act
FTCA	Federal Trade Commission Act
FOIA	Freedom of Information Act
FFA	Flammable Fabrics Act
H-S-R A	Hart-Scott-Rodino Antitrust Improvements Act
RPA	Robinson-Patman Act
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Braswell, Inc. v. FTC		
(N.D. Ga. 1980)		14 C.D. 367
Braswell, Inc.; U.S. v.		
(N.D. Ga. 1981)		15 C.D. 489
Bridgestone Tire Co. of America, Inc.; U.S. v.		
(C.D. Cal. 1978)		12 C.D. 501
Brigadier Industries Corp.; FTC v.		
(D.C. Cir. 1979)	613 F.2d 1110	13 C.D. 574
Bristol-Myers Co. v. FTC		
(D.D.C. 1976)		10 C.D. 559
(S.D.N.Y. 1976)		10 C.D. 563
(D.C. Cir. 1978)	598 F.2d 18	12 C.D. 243
(D.D.C. 1978)		12 C.D. 297
(D.D.C. 1979)		13 C.D. 71
Britene International Textile Corp.; U.S. v.		
(S.D.N.Y. 1979)		13 C.D. 657

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British Oxygen Co., Ltd.; FTC v.		
(3d Cir. 1976)	529 F.2d 196	10 C.D. 40
(D. Del. 1977)	437 F.Supp. 79	11 C.D. 587
Brown, Catherine W. v. FTC		
(D.D.C. 1981)		15 C.D. 497
Brown & Williamson Tobacco Corp.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 39
(S.D.N.Y. 1981)		15 C.D. 515
Brown & Williamson Tobacco Corp. v. FTC		
(W.D. Ky. 1982)		16 C.D. 355
(W.D. Ky. 1982)		16 C.D. 359
(6th Cir. 1982)		16 C.D. 395
Browning Arms Co.; U.S. v.		
(D. Utah 1976)		10 C.D. 566
Brunswick Corp. and Marines Corp. v. FTC		
(8th Cir. 1981)	657 F.2d 971	15 C.D. 421
Cert. denied (1982)	456 U.S. 915	
Budget Marketing, Inc.; U.S. v.		
(S.D. Iowa 1980)		14 C.D. 544
Bureau of Collections, et al.; FTC v.		
(N.D. Ala. 1982)		16 C.D. 219
Cadence Industries Corp.; U.S. v.		
(E.D. Pa. 1980)		14 C.D. 543
Cafarelli, William B. and Tri-State Construction Co., Inc.; U.S. v.		
(D. Idaho 1980)		14 C.D. 543
California Milk Producers Advisory Board v. FTC		
(9th Cir. 1977)	549 F.2d 1321	11 C.D. 151
Cert. denied (1977)	434 U.S. 876	
California, State of, ex rel. C.B. Christensen, Director of Food and Agriculture v. FTC		
(9th Cir. 1977)	549 F.2d 1321	11 C.D. 151
Cert. denied (1977)	434 U.S. 876	
Canyon House, Inc.; U.S. v.		
(D.D.C. 1978)		12 C.D. 503
Capital Credit Corp.; U.S. v.		
(D.D.C. 1980)		14 C.D. 547
Carl W. Newell Manufacturing; U.S. v.		
(C.D. Cal. 1981)		15 C.D. 520
Carter, Donald P.; FTC v.		
(D.D.C. 1977)		11 C.D. 729
(D.D.C. 1979)	464 F.Supp. 633	13 C.D. 33
(D.D.C. 1980)		14 C.D. 25
(D.C. Cir. 1980)	636 F.2d 781	14 C.D. 479

Name of Case	Reference	Reported in
Casey, Sid; FTC v.		
(9th Cir. 1978)	578 F.2d 793	12 C.D. 115
Casey, Sid v. FTC		
(W.D. Wash. 1977)		11 C.D. 457
(9th Cir. 1978)	578 F.2d 793	12 C.D. 115
Centex Homes Midwest, Inc.; U.S. v.		
(N.D. Ill. 1981)		15 C.D. 517
Certainteed Corp. and Johns-Manville Corp.; FTC v.		
(D. Colo. 1979)		13 C.D. 408
(D. Colo. 1979)		13 C.D. 522
Charlton, Francis J. v. FTC		
(D.C. Cir. 1976)	543 F.2d 903	10 C.D. 179
Checker Motors Corp. and David R. Markin; FTC v.		
(6th Cir. 1976)	532 F.2d 541	10 C.D. 174
Checker Taxi Co., Inc. and Jerry E. Feldman; FTC v.		
(7th Cir. 1976)	432 F.2d 1092	10 C.D. 126
Chesson Oil Co., Inc.; U.S. v.		
(W.D. La. 1982)		16 C.D. 502
Chilton Corp. v. FTC		
(N.D. Tex. 1979)		13 C.D. 96
Chocolate Manufacturers Ass'n v. FTC		
(D.D.C. 1978)		12 C.D. 499
(D.C. Cir. 1979)	617 F.2d 611	13 C.D. 448
Cert. denied (1980)	447 U.S. 921	
Chrysler Corp. v. FTC		
(D.C. Cir. 1977)	561 F.2d 357	11 C.D. 497
Citcorp; FTC v.		
(S.D.N.Y. 1979)		13 C.D. 155
City of Battle Creek, The v. FTC		
(W.D. Mich. 1979)	481 F.Supp. 538	13 C.D. 562
City Sewing Machine Co., Inc., The; U.S. v.		
(D. Kans. 1978)		12 C.D. 503
Clausen, A.W.; FTC v.		
(S.D.N.Y. 1977)	441 F.Supp. 234	11 C.D. 679
(S.D.N.Y. 1978)		12 C.D. 151
Claxton Bakery, Inc.; U.S. v.		
(S.D. Ga. 1980)		14 C.D. 547
Cliffdale Associates, Inc.; FTC v.		
(D.C. Cir. 1981)		15 C.D. 45
Coca-Cola Co., The v. FTC		
(D.C. Cir. 1981)	642 F.2d 1387	15 C.D. 35
Cockrell, Sid; FTC v.		
(D.D.C. 1977)	431 F.Supp. 558	11 C.D. 175
(D.D.C. 1977)	431 F.Supp. 561	11 C.D. 191
Colt International; U.S. v.		
(S.D. Tex. 1981)		15 C.D. 520

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Collectron, Inc.; U.S. v.		
(D. Md. 1980)		14 C.D. 548
Collegiate Recovery & Credit Assistance Programs, Inc. and Jon V. Chase; U.S. v.		
(N.D. Okla. 1982)		16 C.D. 502
Commercial Securities Co., Inc. and Audubon Life Insurance Co. v. FTC		
(M.D. La. 1982)	543 F.Supp. 1362	16 C.D. 241
Commodore Corp., The, and Ray Gans; FTC v.		
(D.D.C. 1980)		14 C.D. 135
Compagnie de Saint-Gobain-Pont-a Mousson; FTC v.		
(D.C. Cir. 1979)		13 C.D. 520
(D.D.C. 1980)	493 F.Supp. 286	14 C.D. 69
(D.C. Cir. 1980)	636 F.2d 1300	14 C.D. 419
Connecticut State Medical Society and New Haven County Medical Ass'n., Inc. v. FTC		
(2d Cir. 1980)	638 F.Supp. 443	14 C.D. 383
Affirmed (1982)	455 U.S. __	
Conoco, Inc. v. FTC		
(S.D. Tex. 1982)		16 C.D. 101
(S.D. Tex. 1982)		16 C.D. 489
Con-Serv, a Division of Bay State Gas Co. and Mono-Therm Industries, Inc. v. FTC		
(10th Cir. 1981)	653 F.2d 1373	15 C.D. 245
Consultants in Radiology and Radiology Consultants, Inc.; U.S. v.		
(W.D. Okla. 1980)		14 C.D. 548
Consumer Finance Corp. and Richard M. DeMarco; U.S. v.		
(D.N.J. 1982)		16 C.D. 503
Consumers Union of U.S., Inc. and Public Citizen, Inc. v. FTC		
(D.D.C. 1982)		16 C.D. 223
(D.D.C. 1982)		16 C.D. 235
Consumers Union of U.S., Inc., et al. v. FTC		
(D.C. Cir. 1982)	691 F.2d 575	16 C.D. 367
Corporate Patterns Report Litigation		
(D.D.C. 1977)	432 F.Supp. 274	11 C.D. 39
(D.D.C. 1977)	432 F.Supp. 291	11 C.D. 201
(D.D.C. 1977)		11 C.D. 509
(D.D.C. 1977)		11 C.D. 573
(D.C. Cir. 1978)	595 F.2d 685	12 C.D. 181
Cert. denied (1978)	439 U.S. 958	
(D.C. Cir. 1978)		12 C.D. 303

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Courshon, Arthur H. v. FTC		
(D.D.C. 1977)	435 F.Supp. 24	11 C.D. 73
CPC International, Inc.; U.S. v.		
(N.D. Cal. 1981)		15 C.D. 337
(N.D. Cal. 1982)		16 C.D. 499
Credit Rating Bureau, Inc.; U.S. v.		
(E.D.N.Y. 1981)		15 C.D. 522
Crocker National Corp.; U.S. v.		
(9th Cir. 1981)	656 F.2d 428	15 C.D. 441
Dairymen, Inc. v. FTC		
(D.D.C. 1980)		14 C.D. 281
(W.D. Ky. 1981)		15 C.D. 13
(W.D. Ky. 1981)		15 C.D. 31
(W.D. Ky. 1981)		15 C.D. 313
(6th Cir. 1982)	684 F.2d 376	16 C.D. 253
Cert. denied (1983)		
Dana Corp. and The LTV Corp.; FTC v.		
(N.D. Tex. 1981)		15 C.D. 7
Danube Carpet Mills, Inc. and Carl D. Hagaman; U.S. v.		
(N.D. Ga. 1982)	540 F.Supp. 507	16 C.D. 169
DeMarco, Richard M. and Consumer Finance Corp.; U.S. v.		
(D. N.J. 1982)		16 C.D. 503
Disco Oil Co.; U.S. v.		
(N.D. Ill. 1978)		12 C.D. 503
Dixie Finance Co., Inc.; FTC v.		
(E.D. La. 1982)		16 C.D. 181
Cert. denied (1983)		
Dixieland Construction Co., Inc.; U.S. v.		
(N.D. Ala. 1979)		13 C.D. 656
Dobbs, Inc.; U.S. v.		
(E.D. Mich. 1978)		12 C.D. 503
Doherty, Arthur J. v. FTC		
(D.D.C. 1981)		15 C.D. 179
Domestic Finance Corp. v. FTC		
(E.D. Pa. 1982)	543 F.Supp. 1071	16 C.D. 258
Downing Associates, Inc.; U.S. v.		
(D. R.I. 1980)		14 C.D. 544
Dresser Industries, Inc.; FTC v.		
(D.D.C. 1977)		11 C.D. 419
Duponte, Martin and Nautilus of the Rockies v. Arthur Jones d/b/a Nautilus Sports/Medical Industries		
(D. Colo. 1981)		15 C.D. 301
Ebringhaus, J.C.B., Jr. v. FTC		
(D.D.C. 1980)	525 F.Supp. 21	14 C.D. 513

Name of Case	Reference	Reported in
E.I. Du Pont de Nemours and Co.; FTC v.		
(D.C. 1979)		13 C.D. 12
E.I. Du Pont de Nemours and Co. v. FTC		
(D. Del. 1980)	488 F.Supp. 747	14 C.D. 137
Elgin Grain Co.; U.S. v.		
(N.D. Ohio 1982)		16 C.D. 500
Eli Lilly and Co. v. FTC		
(S.D. Ind. 1977)		11 C.D. 187
Empire Kosher Poultry, Inc.; U.S. v.		
(N.D. Pa. 1979)		13 C.D. 659
Enco Inc., Exxon Corp. and; FTC v.		
(D.D.C. 1979)		13 C.D. 296
(D.D.C. 1979)		13 C.D. 390
(D.D.C. 1979)		13 C.D. 501
Encyclopaedia Britiannica, Inc. v. FTC		
(7th Cir. 1979)	605 F.2d 964	13 C.D. 341
Cert. denied (1980)	445 U.S. 934	
Equifax, Inc. v. FTC		
(9th Cir. 1980)	618 F.2d 63	14 C.D. 163
(11th Cir. 1982)	678 F.2d 1047	16 C.D. 187
Erie Coca-Cola Bottling Co.; U.S. v.		
(E.D. Pa. 1982)		16 C.D. 500
Ernstthal, Henry L.; FTC v.		
(D.D.C. 1978)		12 C.D. 99
(D.D.Cir. 1979)	607 F.2d 488	13 C.D. 402
European Deliveries, Inc.; U.S. v.		
(D. Mass. 1981)		15 C.D. 520
Exxon Corp. and Enco Inc.; FTC v.		
(D.D.C. 1979)		13 C.D. 296
(D.D.C. 1979)		13 C.D. 390
(D.D.C. 1979)		13 C.D. 501
Exxon Corp.; FTC v.		
(D.D.C. 1980)		14 C.D. 253
(D.C. Cir. 1980)	636 F.2d 1336	14 C.D. 519
Exxon Corp. v. FTC		
(D. Del. 1976)	411 F.Supp. 1362	10 C.D. 46
(D.D.C. 1977)		11 C.D. 189
(D. Del. 1977)	436 F.Supp. 1012	11 C.D. 241
(D.C. Cir. 1977)		11 C.D. 427
(D. Del. 1977)	436 F.Supp. 1019	11 C.D. 575
(D.C. Cir. 1978)	589 F.2d 582	12 C.D. 339
(D.D.C. 1978)	466 F.Supp. 1088	12 C.D. 423
(3d Cir. 1978)	588 F.2d 895	12 C.D. 481
(D. Del. 1979)		13 C.D. 151
(D.D.C. 1979)	476 F.Supp. 713	13 C.D. 360
(D.D.C. 1980)		14 C.D. 83
(D.C. Cir. 1980)	663 F.2d 120	14 C.D. 369

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Exxon Corp. & Gulf Oil Corp v. FTC		
(D.C. Cir. 1981)	665 F.2d 1274	15 C.D. 477
Exxon Corp.; U.S. v.		
(D.D.C. 1980)		14 C.D. 548
Factory Air Conditioning Corp.; U.S. v.		
(W.D. Tex. 1981)		15 C.D. 520
Falconer Glass Industries, Inc.; U.S. v.		
(W.D.N.Y. 1981)		15 C.D. 520
Faltico, Patrick R.; U.S. v.		
(8th Cir. 1978)	586 F.2d 1267	12 C.D. 405
Fedders Corp. v. FTC		
(2d Cir. 1976)	529 F.2d 1398	10 C.D. 32
Cert. denied (1976)	429 U.S. 818	
(S.D.N.Y. 1980)	494 F.Supp. 325	14 C.D. 295
Fedders Corp.; U.S. v.		
(D.N.J. 1981)		15 C.D. 515
Federal Paper Board Co., Inc.; FTC v.		
(S.D.N.Y. 1977)	434 F.Supp. 1088	11 C.D. 535
Federal Trade Commission (see name of other party)		
Federated Department Stores; U.S. v.		
(S.D. Ohio 1978)		12 C.D. 503
Feldman, Jerry E., and Checker Taxi Co., Inc.; FTC v.		
(7th Cir. 1976)	532 F.2d 1092	10 C.D. 126
F & H Products; U.S. v.		
(W.D.N.Y. 1980)		14 C.D. 545
Fidelity & Deposit Co. of Maryland and American General Insurance Co. v. FTC		
(9th Cir. 1979)	589 F.2d 462	13 C.D. 15
Firestone, Daniel; FTC v.		
(N.D. Ohio 1976)		10 C.D. 316
Firestone Tire & Rubber Co.; U.S. v.		
(N.D. Ohio 1976)		10 C.D. 565
First National City Bank v. FTC		
(2d Cir. 1976)	538 F.2d 937	10 C.D. 349
Fleming, Edward J., III v. FTC		
(D.C.C. 1980)		14 C.D. 409
(D.C.C. 1980)		14 C.D. 459
(D.C. Cir. 1982)	670 F.2d 311	16 C.D. 13
Floersheim, Sydney N.; U.S. v.		
(C.D. Cal. 1980)		14 C.D. 177
(9th Cir. 1981)		15 C.D. 297
Fluhrer Bakeries, Inc.; U.S. v.		
(N.D. Cal. 1981)		15 C.D. 520
Food Town Stores, Inc.; FTC v.		
(4th Cir. 1976)	539 F.2d 1339	10 C.D. 395
(4th Cir. 1977)	547 F.2d 247	11 C.D. 7

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Ford Motor Co. v. FTC		
(6th Cir. 1976)	547 F.2d 954	10 C.D. 327
Cert. denied (1977)	431 U.S. 915	
Ford Motor Co., et al. v. FTC		
(9th Cir. 1981)	673 F.2d 1008	15 C.D. 355
(9th Cir. 1982)		16 C.D. 129
Cert. denied (1982)		
Formica Corp. v. Saul F. Lefkowitz		
(C.C.P.A. 1979)	590 F.2d 915	13 C.D. 47
Foremost-McKesson Inc.; FTC v.		
(S.D.N.Y. 1981)		15 C.D. 63
(S.D.N.Y. 1981)		15 C.D. 275
(S.D.N.Y. 1982)		16 C.D. 125
Foremost-McKesson, Inc.; U.S. v.		
(N.D. Cal., 1982)		16 C.D. 499
Four States Builders and Remodelers, Inc.; U.S. v.		
(D.N.J. 1978)		12 C.D. 501
rancis Ford, Inc. v. FTC		
(D. Ore. 1978)		12 C.D. 35
Francis Ford, Inc., et al. v. FTC		
(9th Cir. 1981)	673 F.2d 1008	15 C.D. 355
(9th Cir. 1982)		16 C.D. 129
Cert. denied (1982)		
Fruehauf Corp. v. FTC		
(2d Cir. 1979)	603 F.2d 345	13 C.D. 225
FTC Franchise Disclosure Rule Review, In re		
(9th Cir. 1980)		14 C.D. 175
Cert. denied (1981)	454 U.S. 816	
Fund for Constitutional Government v. FTC		
(D.D.C. 1981)		15 C.D. 229
Gans, Ray and the Commodore Corp.; FTC v.		
(D.D.C. 1980)		14 C.D. 135
General Electric Co. v. FTC		
(N.D.N.Y. 1976)	411 F.Supp. 10	10 C.D. 196
General Finance Corp., et al. v. FTC		
(N.D. Ill. 1982)		16 C.D. 217
General Foods Corp. v. FTC		
(D. Del. 1980)		14 C.D. 405
General Mills Fun Group, Inc.; U.S. v.		
(D. Minn. 1979)		13 C.D. 656
General Motors Corp.; FTC v.		
(N.D. Ohio 1977)		11 C.D. 647
(N.D. Ohio 1978)		12 C.D. 103
(N.D. Ohio 1978)		12 C.D. 179
General Motors Corp. v. FTC		
(N.D. Ohio 1977)		11 C.D. 667

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Georgia Telco Credit Union; U.S. v.		
(N.D. Ga. 1980)		14 C.D. 548
Giant Food Markets, Inc.; U.S. v.		
(E.D. Tenn. 1979)		13 C.D. 659
Gibson, Herbert R., Jr., et al. v. FTC		
(5th Cir. 1982)	682 F.2d 554	16 C.D. 291
Cert. denied (1983)		
Gibson, H.R., Sr., et al. v. FTC		
(5th Cir. 1982)	682 F.2d 554	16 C.D. 291
Cert. denied (1983)		
Gibson Products of San Antonio, Inc.; FTC v.		
(5th Cir. 1978)	569 F.2d 900	12 C.D. 23
5th Cir. 1978)		12 C.D. 81
Gifford-Hill & Co., Inc. v. FTC		
(D.D.C. 1976)		10 C.D. 18
(D.D.C. 1976)		10 C.D. 136
Glenn W. Turner Enterprises, Inc.; FTC v.		
(M.D. Fla. 1978)	446 F.Supp. 1113	12 C.D. 5
Golden Fifty Pharamaceutical Co., Inc.; U.S. v.		
(N.D. Ill. 1976)	421 F.Supp. 1199	10 C.D. 490
(N.D. Ill. 1977)		11 C.D. 756
Goodyear Tire & Rubber Co., The v. FTC		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101
Great Atlantic & Pacific Tea Co., Inc., The v. FTC		
(2d Cir. 1977)	557 F.2d 971	11 C.D. 473
(S.Ct. 1979)	440 U.S. 69	13 C.D. 79
Great Lakes Chemical Corp.; FTC v.		
(N.D. Ill. 1981)	528 F.Supp. 84	15 C.D. 277
Great Western Cities, Inc. of New Mexico; U.S. v.		
(D.D.C. 1977)		11 C.D. 755
Grolier, Inc. v. FTC		
(D.D.C. 1976)		10 C.D. 325
(D.D.C. 1976)		10 C.D. 549
(D.D.C. 1978)		12 C.D. 9
(D.D.C. 1979)		13 C.D. 207
(D.D.C. 1980)		14 C.D. 87
(9th Cir. 1980)	615 F.2d 1215	14 C.D. 153
(D.D.C. 1980)		14 C.D. 251
(D.C. Cir. 1982)	671 F.2d 553	16 C.D. 47
Rev'd (1983)	__ U.S. __	
Guaranteed Quality Meats, Inc.; U.S. v.		
(W.D. Mo. 1976)		10 C.D. 527
(W.D. Mo. 1980)		14 C.D. 545

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Gulf Coast Builders Exchange, Inc.; U.S. v. (M.D. Fla. 1982)		16 C.D. 500
Gulf Oil Corp. and Exxon Corp. v. FTC (D.C. Cir. 1981)	665 F.2d 1275	15 C.D. 477
Haband Co., Inc.; U.S. v. (D.N.J. 1979)		13 C.D. 659
Hagaman, Carl D. and Danube Carpet Mills, Inc.; U.S. v. (N.D. Ga. 1982)	540 F.Supp. 507	16 C.D. 169
Hartnack, Carl E.; FTC v. (D.D.C. 1976)		10 C.D. 543
Hasbro Industries, Inc.; U.S. v. (D. R.I. 1978)		12 C.D. 502
Hattiesburg Coca-Cola Bottling Co.; U.S. v. (S.D. Miss. 1982)		16 C.D. 501
H.B.G. Corp.; U.S. v. (N.D. Ill. 1981)		15 C.D. 520
Hedaya Brothers, Inc.; U.S. v. (E.D.N.Y. 1979)		13 C.D. 657
Hertz Corp.; U.S. v. (S.D. Fla. 1981)		15 C.D. 131
(S.D. Fla. 1982)		16 C.D. 502
Heublein, Inc. v. FTC (D.D.C. 1978)	457 F.Supp. 52	12 C.D. 153
(D.C. Conn. 1982)	539 F.Supp. 123	16 C.D. 109
H.N. Singer, Inc.; FTC v. (N.D. Cal. 1981)	534 F.Supp. 24	15 C.D. 1
(N.D. Cal. 1981)		15 C.D. 85
(N.D. Cal. 1981)		15 C.D. 183
(N.D. Cal. 1981)		15 C.D. 227
(9th Cir. 1982)	668 F.2d 1107	16 C.D. 91
(N.D. Cal. 1982)		16 C.D. 371
Hobart Corp. v. FTC (3d Cir. 1976)	530 F.2d 515	10 C.D. 101
Holguin, Alice, as Executrix of the Estate of Albert R. Linnick, Deceased v. FTC (C.D. Cal. 1979)		13 C.D. 99
Horizon Corp. v. FTC (D.D.C. 1976)		10 C.D. 512
Hylton Enterprises, Inc.; U.S. v. (E.D. Va. 1981)		15 C.D. 517
IC Industries, Inc.; U.S. v. (D.D.C. 1979)		13 C.D. 655
Indiana Federation of Dentists v. FTC (S.D. Ind. 1979)		13 C.D. 77
Indiana Manufactured Housing Ass'n, Inc. v. FTC (7th Cir. 1981)	641 F.2d 481	15 C.D. 41

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Industrial Automobile Corp.; U.S. v.		
(C.D. Cal. 1980)		14 C.D. 546
Ingersoll-Rand Co. v. FTC		
(N.D.N.Y. 1976)	421 F.Supp. 1004	10 C.D. 196
Inland Steel Co. v. FTC		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101
Intalex, Ltd. and Ira Rosenfeld; U.S. v.		
(S.D.N.Y. 1980)		14 C.D. 544
Interco, Inc. v. FTC		
(D.D.C. 1979)	478 F.Supp. 103	13 C.D. 143
(D.C. Cir. 1979)		13 C.D. 175
(D.D.C. 1979)	490 F.Supp. 39	13 C.D. 586
Internatio-Muller Holding, Inc.; U.S. v.		
(S.D.N.Y. 1981)		15 C.D. 520
International Diamond Corporation; FTC v.		
(N.D. Cal. 1982)		16 C.D. 1
(N.D. Cal. 1982)		16 C.D. 105
International Set, Inc.; U.S. v.		
(C.D. Cal. 1980)		14 C.D. 546
ITT Continental Baking Co., Inc. v. FTC		
(2d Cir. 1976)	532 F.2d 207	10 C.D. 138
(D.D.C. 1976)		10 C.D. 193
(D.D.C. 1976)		10 C.D. 367
ITT Continental Baking Co.; U.S. v.		
(D. Colo. 1981)		15 C.D. 515
Ivy International, Ltd.; U.S. v.		
(S.D.N.Y. 1981)		15 C.D. 517
Jackson Drop Forge Co.; U.S. v.		
(E.D. Mich. 1981)		15 C.D. 521
Jandy Textiles Corp.; U.S. v.		
(S.D.N.Y. 1982)		16 C.D. 501
Jaymar-Ruby, Inc. v. FTC		
(N.D. Ind. 1980)	496 F.Supp. 838	14 C.D. 307
(7th Cir. 1981)	651 F.2d 506	15 C.D. 169
Jay Norris, Inc. v. FTC		
(2d Cir. 1979)	598 F.2d 1244	13 C.D. 160
Cert. denied (1979)	444 U.S. 980	
J.B. Williams Co., Inc., The; U.S. v.		
(S.D.N.Y. 1976)		10 C.D. 565
J.B. Williams Co., Inc., The and Parkson Advertising Agency, Inc.; U.S. v.		
(D.D.C. 1979)		13 C.D. 655
Jim Walter Corp.; FTC v.		
(N.D. Tex. 1980)		14 C.D. 203
(5th Cir. 1981)	651 F.2d 251	15 C.D. 189
Jim Walter Corp. v. FTC		
(5th Cir. 1980)	625 F.2d 676	14 C.D. 319
John Crosland Co.; U.S. v.		
(W.D. N.C. 1981)		15 C.D. 517

Name of Case	Reference	Reported in
Johns-Manville Corp. and Certainteed Corp.; FTC v.		
(D. Colo. 1979)		13 C.D. 408
(D. Colo. 1979)		13 C.D. 522
Johnson, Charles R.; U.S. v.		
(8th Cir. 1976)	541 F.2d 710	10 C.D. 435
(E.D. Md. 1976)		10 C.D. 565
Johnson Products Co. v. FTC		
(7th Cir. 1977)	549 F.2d 35	11 C.D. 101
John Taylor Fertilizing Co.; U.S. v.		
(E.D. Ga. 1980)		14 C.D. 547
Jones, Arthur d/b/a Nautilus Sports/Medical Industries v. Martin Duponte and Nautilus of the Rockies		
(D. Colo. 1981)		15 C.D. 301
Joni Blair of California, Inc.; U.S. v.		
(C.D. Cal. 1981)		15 C.D. 521
JS&A Group, Inc.; FTC v.		
(N.D. Ill. 1980)		14 C.D. 227
JS&A Group, Inc.; U.S. v.		
(N.D. Ill. 1982	547 F.Supp. 20	16 C.D. 133
(N.D. Ill. 1982)		16 C.D. 265
J. Walter Thompson Co. v. FTC		
(6th Cir. 1976)	547 F.2d 954	10 C.D. 327
Kaiser Aluminum & Chemical Corp. v. FTC		
(7th Cir. 1981)	652 F.2d 1324	15 C.D. 201
Karr, Atida H.; FTC v.		
(D.D.C. 1978)		12 C.D. 19
Katharine Gibbs School (Inc.) v. FTC		
(2d Cir. 1979)	612 F.2d 658	13 C.D. 527
(2d Cir. 1980)		14 C.D. 121
Katharine Gibbs School (Inc.) and LaSalle Extension University v. FTC		
(D.D.C. 1979)		13 C.D. 73
(D.C. Cir. 1980)	627 F.2d 481	14 C.D. 241
Kazdin, Ronald S.; FTC v.		
(N.D. Ohio 1980)		14 C.D. 257
Kellogg Co. and J.E. Lonning; FTC v.		
(D.C. Cir. 1976)	539 F.2d 202	10 C.D. 337
Kellogg Co. v. FTC		
(D.D.C. 1978)		12 C.D. 499
(D.C. Cir. 1979)	617 F.2d 611	13 C.D. 448
Cert. denied (1980)	447 U.S. 921	
(D.D.C. 1981)		15 C.D. 51
(D.D.C. 1981)		15 C.D. 353
Kennecott Copper Corp. v. FTC		
(10th Cir. 1976)	542 F.2d 801	10 C.D. 310
(10th Cir. 1976)		10 C.D. 502
Kerr-McGee Corp. v. FTC		
(D.C. Cir. 1977)		11 C.D. 427
(D.C. Cir. 1978)	589 F.2d 582	12 C.D. 339

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Kettler Bros., Inc.; U.S. v.		
(E.D. Md. 1981)		15 C.D. 518
Kloda, Ruben and Atlantic Hosiery, Inc.; U.S. v.		
(S.D. Fla. 1981)		15 C.D. 515
Korman Corp., The; U.S. v.		
(E.D. Pa. 1981)		15 C.D. 518
Lad Irrigation Co., Inc.; U.S. v.		
(E.D. Wash. 1981)		15 C.D. 521
Lancaster Colony Corp., Inc.; FTC v.		
(S.D.N.Y. 1977)	434 F.Supp. 1088	11 C.D. 535
LaSalle Extension University and Katharine Gibbs School (Inc.) v. FTC		
(D.D.C. 1979)		13 C.D. 23
(D.C. Cir. 1980)	627 F.2d 481	14 C.D. 241
Lasater, Wayne, d/b/a American Bridal Consultants; U.S. v.		
(W.D. Okla. 1978)		12 C.D. 502
Lawson Hill Leather and Shoe Co., Inc.; U.S. v.		
(D. Mass. 1979)		13 C.D. 659
Lee, Raymond v. FTC		
(D.C. Cir. 1980)	679 F.2d 905	14 C.D. 539
Lefkowitz, Saul F.; Formica Corp. v.		
(C.C.P.A. 1979)	590 F.2d 915	13 C.D. 47
Lender Service Inc.; U.S. v.		
(N.D. Okla. 1982)		16 C.D. 502
Lester Industries, Inc.; U.S. v.		
(N.D. Ohio 1977)		11 C.D. 756
Liggett & Myers, Inc. v. FTC		
(4th Cir. 1977)	567 F.2d 1273	11 C.D. 749
Liggett Group, Inc.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 39
(S.D.N.Y. 1981)		15 C.D. 515
Line of Business Report Litigation		
(D.D.C. 1977)	432 F.Supp. 274	11 C.D. 39
(D.D.C. 1977)	432 F.Supp. 291	11 C.D. 201
(D.D.C. 1977)		11 C.D. 509
(D.D.C. 1977)		11 C.D. 573
(D.D.Cir. 1978)	595 F.2d 685	12 C.D. 181
Cert. denied (1978)	439 U.S. 958	
(D.C. Cir. 1978)		12 C.D. 303
Litton Industries, Inc. and Litton Systems, Inc. v. FTC		
(9th Cir. 1982)	676 F.2d 364	16 C.D. 145
Lonning, J.E., and Kellogg Co.; FTC v.		
(D.C. Cir. 1976	539 F.2d 202	10 C.D. 337
Lorillard Division of Loew's Theatres, Inc.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 39
(S.D.N.Y. 1981)		15 C.D. 516

Name of Case	Reference	Reported in
Lory Fabrics, Inc.; U.S. v.		
(S.D.N.Y. 1980)		14 C.D. 545
Louisiana-Pacific Corp.; U.S. v.		
(D. Oreg. 1982)	554 F.Supp. 501	16 C.D. 159
(D. Oreg. 1982)	554 F.Supp. 504	16 C.D. 477
LTV Corp., The and Dana Corp.; FTC v.		
(N.D. Tex. 1981)		15 C.D. 7
Lukens Steel Co.; FTC v.		
(D.D.C. 1977)	444 F.Supp. 803	11 C.D. 113
(D.D.C. 1978)	454 F.Supp. 1182	12 C.D. 125
Lundy Electronics & Systems, Inc.; U.S. v.		
(E.D.N.Y. 1980)		14 C.D. 546
MacMen Financial Services, Inc.; U.S. v.		
(W.D. Va. 1980)		14 C.D. 548
Majestic Weaving Co., Inc.; U.S. v.		
(S.D.N.Y. 1981)		15 C.D. 521
Manufacturers Hanover Consumer Services Inc. v. FTC		
(E.D. Pa. 1982)	543 F.Supp. 1071	16 C.D. 259
Maralco Enterprises, Inc.; U.S. v.		
(S.D.N.Y. 1979)		13 C.D. 655
Marathon Oil Co. v. FTC		
(N.D. Ohio 1980)		14 C.D. 33
Mariner Corp. and Brunswick Corp. v. FTC		
(8th Cir. 1981)	657 F.2d 971	15 C.D. 421
Cert. denied (1982)	456 U.S. 915	
Marketing Associates, Inc.; FTC v.		
(D. Colo. 1981)		15 C.D. 389
(D. Colo. 1981)		15 C.D. 507
Markin, David R., and Checker Motors Corp.; FTC v.		
(6th Cir. 1976)	532 F.2d 541	10 C.D. 174
Martin Marietta Corp. v. FTC		
(D.D.C. 1979)	475 F.Supp. 338	13 C.D. 269
(D.D.C. 1979)		13 C.D. 422
Maxine of Hollywood, Inc.; U.S. v.		
(C.D. Cal. 1981)		15 C.D. 521
McDermott, Kathleen v. FTC		
(D.D.C. 1981)		15 C.D. 69
(D.D.C. 1981)		15 C.D. 115
Maylis Textile Corp.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 501
Melley, James A., Sr. and Standard Educators, Inc.; U.S. v.		
(D. Conn. 1982)		16 C.D. 500
Merck & Co., Inc. v. FTC		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101

Name of Case	Reference	Reported in
Merck & Co., Inc.; U.S. v.		
(D.D.C. 1978)		12 C.D. 501
Mervin, Michael N. v. FTC		
(D.C. Cir. 1978)	591 F.2d 821	12 C.D. 375
Metadure Corp.; U.S. v.		
(E.D.N.Y. 1980)		14 C.D. 546
Meyer, Elliot and National Dynamics Corp; U.S. v.		
(S.D.N.Y. 1981)		15 C.D. 137
(S.D.N.Y. 1981)	525 F.Supp. 380	15 C.D. 503
(S.D.N.Y. 1982)		16 C.D. 499
Mid-States Mortgage Corp.; U.S. v.		
(E.D. Mich. 1978)		12 C.D. 502
Midwest Wire Co.; U.S. v.		
(N.D. Ohio 1980)		14 C.D. 546
Miller, James C., III; Donald L. Bachman v.		
(D.D.C. 1982)	559 F.Supp. 150	16 C.D. 397
Miller, Ralph H.; FTC v.		
(N.D. Ind. 1976)		10 C.D. 260
(7th Cir. 1977)	431 F.2d 452	11 C.D. 159
Milliken & Company v. FTC		
(D.D.C. 1982)		16 C.D. 141
Milton Bradley Co., et al. v. FTC		
(D.D.C. 1980)		14 C.D. 409
(D.D.C. 1980)		14 C.D. 459
(D.C. Cir. 1982)	670 F.2d 311	16 C.D. 13
Missouri Distributing Co.; U.S. v.		
(W.D. Mo. 1982)		16 C.D. 501
Mobil Oil Corp.; FTC v.		
(D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253
Cert. denied (1977)	431 U.S. 974	
Mobil Oil Corp. v. FTC		
(S.D.N.Y. 1976)	406 F.Supp. 305	10 C.D. 1
(S.D.N.Y. 1977)	430 F.Supp. 849	11 C.D. 91
(S.D.N.Y. 1977)	430 F.Supp. 855	11 C.D. 121
(2d Cir. 1977)	562 F.2d 170	11 C.D. 631
(S.D.N.Y. 1978)		12 C.D. 477
(D.C. Cir. 1981)	665 F.2d 1274	15 C.D. 477
Modern Home Improvement Corp.; U.S. v.		
(N.D. Ala. 1979)		13 C.D. 656
Mod-Maid Imports, Inc.; U.S. v.		
(S.D.N.Y. 1980)		14 C.D. 547
Mono-Therm Industries, Inc. and Con-Serv., a Division of Bay State Gas Co. v. FTC		
(10th Cir. 1981)	653 F.2d 1373	15 C.D. 245

Name of Case	Reference	Reported in
Montgomery Ward & Co., Inc.; U.S. v. (D.D.C. 1979)		13 C.D. 659
Montgomery Ward & Co., Incorporated v. FTC (9th Cir. 1982)	691 F.2d 1322	16 C.D. 403
Munswick Beverage & Cigar Co., Inc.; U.S. v. (E.D. Ark. 1981)		15 C.D. 521
Murjani USA, Ltd.; U.S. v. (S.D.N.Y. 1979)		13 C.D. 659
Mutual Assurance Society of Alabama, The v. FTC (N.D. Ala. 1982)		16 C.D. 465
Nanlo, Inc. (Southbridge Evening News); U.S. v. (D. Mass. 1981)	519 F.Supp. 7	15 C.D. 303
(1st Cir. 1982)		16 C.D. 500
National Automobile Dealers Ass'n v. FTC (N.D. La. 1976)	421 F.Supp. 21	10 C.D. 440
National Chinchilla, Inc.; U.S. v. (D. Kans. 1977)		11 C.D. 755
National Commission on Egg Nutrition v. FTC (7th Cir. 1977)	570 F.2d 157	11 C.D. 697
Cert. denied (1978)	439 U.S. 821	
National Dynamics Corp.; U.S. v. (S.D.N.Y. 1981)		15 C.D. 111
(S.D.N.Y. 1981)		15 C.D. 139
National Dynamics Corp. and Elliot Meyer; U.S. v. (S.D.N.Y. 1981)		15 C.D. 137
(S.D.N.Y. 1981)	525 F.Supp. 380	15 C.D. 503
(S.D.N.Y. 1982)		16 C.D. 499
National Education Ass'n v. FTC (D. Mass. 1979)		13 C.D. 394
(D. Mass. 1980)		14 C.D. 453
National Siding Corp.; U.S. v. (N.D.Ala. 1980)		14 C.D. 547
National Talent Associates, Inc.; U.S. v. (E.D.N.Y. 1979)		13 C.D. 655
National Tea Co.; FTC v. (8th Cir. 1979)	603 F.2d 694	13 C.D. 278
National Unlimited Business Systems, Inc.; U.S. v. (S.D.N.Y. 1979)		13 C.D. 658
Nationwide Construction Co., Inc.; U.S. v. (N.D. Ala. 1979)		13 C.D. 657

Name of Case	Reference	Reported in
Navigation Sales, Inc.; U.S. v. (S.D. Tex. 1980)		14 C.D. 546
Neighborhood Periodical Club, Inc.; U.S. v. (S.D. Ohio 1980)		14 C.D. 543
Nelson Industries, Inc.; U.S. v. (W.D. Wisc. 1981)		15 C.D. 521
New Haven Country Medical Ass'n and Connecticut State Medical Ass'n v. FTC (2d Cir. 1980)	638 F.2d 443	14 C.D. 64
Northwest Industries, Inc. v. FTC (3d Cir. 1976)	530 F.2d 515	10 C.D. 101
Novi Plastics Co., Inc.; U.S. v. (E.D. Mich. 1981)		15 C.D. 521
Novo Laboratories, Inc. v. FTC (D.D.C. 1981)		15 C.D. 267
Odessky, Don v. FTC (D.D.C. 1979)	471 F.Supp. 1267	13 C.D. 198
Official Airline Guides, Inc. v. FTC (2d Cir. 1980)	630 F.2d 920	14 C.D. 331
Cert. denied (1981)	450 U.S. 917	
O.K. Tire & Rubber Co.; U.S. v. (D. Idaho 1976)		10 C.D. 320
(D. Idaho 1978)		12 C.D. 309
(D. Idaho 1978)		12 C.D. 367
Olin Ski Co., Inc. and Olin Corp.; U.S. v. (S.D.N.Y. 1980)	503 F.Supp. 141	14 C.D. 473
Opportunities Service Co., Inc., Edward W. and Donald F. Scott, d/b/a; U.S. v. (N.D. Ind. 1981)		15 C.D. 516
Orlando Coals, Inc.; U.S. v. (D.W.Va. 1980)		14 C.D. 546
Oscar Mayer & Co., Inc. v. FTC (3d Cir. 1976)	530 F.2d 515	10 C.D. 101
Owens-Corning Fiberglas Corp.; FTC v. (D.D.C. 1979)		13 C.D. 75
(D.C. Cir. 1980)	626 F.2d 966	14 C.D. 97
Owens-Corning Fiberglas Corp. v. Michael Pertschuk (D.C. Cir. 1980)	626 F.2d 966	14 C.D. 97
Packer Plastics, Inc.; U.S. v. (D. Kans. 1982)		16 C.D. 501
Packers Brand Meats, Inc.; FTC v. (8th Cir. 1977)	562 F.2d 9	11 C.D. 597
Panacolor, Inc.; U.S. v. (D.D.C. 1978)		12 C.D. 503

Name of Case	Reference	Reported in
Papercraft Corp.; U.S. v.		
(3d Cir. 1976)	540 F.2d 131	10 C.D. 352
(W.D. Pa. 1977)	426 F.Supp. 916	11 C.D. 29
Parker, James S. v. U.S.		
(Court of Claims 1982)		16 C.D. 165
Parkson Advertising Agency, Inc. and The J.B. Williams Co., Inc.; U.S. v.		
(S.D.N.Y. 1979)		13 C.D. 655
Paron, Raymond M.; U.S. v.		
(C.D. Cal. 1980)		14 C.D. 543
Pattishall, McAuliffe & Hofstetter v. FTC		
(N.D. Ill. 1980)		14 C.D. 27
Peacock Buick, Inc. v. FTC		
(4th Cir. 1977)		11 C.D. 199
Pearl Equipment Co., Inc.; U.S. v.		
(D. Tenn. 1979)		13 C.D. 658
Pendleton, William H. v. Trans Union Systems Corp.		
(E.D. Pa. 1977)	430 F.Supp. 95	11 C.D. 181
Penn Industries, Inc.; U.S. v.		
(S.D.N.Y. 1979)		13 C.D. 658
Pepsico, Inc. v. FTC		
(2d Cir. 1978)		12 C.D. 113
(D.C. Cir. 1981)	642 F.2d 1387	15 C.D. 35
Pepsi-Cola Albany Bottling Co., Inc. v. FTC		
(2d Cir. 1978)		12 C.D. 113
Pertschuk, Michael; Amrep Corp. v.		
(D.D.C. 1979)		13 C.D. 137
Pertschuk, Michael; Donald L. Bachman v.		
(D.D.C. 1977)	437 F.Supp. 234	11 C.D. 637
(D.D.C. 1978)		12 C.D. 45
(D.D.C. 1979)		13 C.D. 103
(D.D.C. 1981)		15 C.D. 299
(D.D.C. 1981)		15 C.D. 333
Pertschuk, Michael; Owens-Corning Fiberglas Corp. v.		
(D.C. Cir. 1980)	626 F.2d 966	14 C.D. 97
Pharmaceutical Research Ass'n; U.S. v.		
(D. Conn 1978)		12 C.D. 503
Phelps Dodge Industries, Inc.; U.S. v.		
(S.D.N.Y. 1979)		13 C.D. 655
(S.D.N.Y. 1982)		16 C.D. 499
Philip Morris Inc.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 39
(S.D.N.Y. 1981)		15 C.D. 516

Name of Case	Reference	Reported in
Piser & Co., Inc.; U.S. v.		
(S.D.N.Y. 1977)		11 C.D. 756
(S.D.N.Y. 1979)		13 C.D. 658
Porter & Dietsch, Inc. v. FTC		
(7th Cir. 1979)	605 F.2d 294	13 C.D. 478
Cert. denied (1980)	445 U.S. 950	
Plattsburg Foundry & Machine Co.; U.S. v.		
(N.D.N.Y. 1982)		16 C.D. 502
Postal Finance Co., et al. v. FTC		
(N.D. Ill. 1982)		16 C.D. 217
Post-Keys-Gardner, Inc.; FTC v.		
(D.D.C. 1977)		11 C.D. 729
Potamkin Cadillac Corp.; U.S. v.		
(S.D.N.Y. 1982)		16 C.D. 59
(2d Cir. 1982)	689 F.2d 379	16 C.D. 351
Cert. denied (1983)		
Public Citizen and Consumers Union of U.S., Inc. v. FTC		
(D.D.C. 1982)		16 C.D. 223
(D.D.C. 1982)		16 C.D. 235
Pulte Home Corp.; U.S. v.		
(E.D. Mich. 1981)		15 C.D. 518
Quinn Concrete Co., Inc.; U.S. v.		
(W.D. Mo. 1982)		16 C.D. 501
Ramage, Paul and Dixie, d/b/a Vanguard International Press; U.S. v.		
(M.D. Fla. 1981)		15 C.D. 522
Radiology Consultants, Inc. and Consultants in Radiology; U.S. v.		
(W.D. Okla. 1980)		14 C.D. 548
Reader's Digest Ass'n, Inc., The; U.S. v.		
(D.Del. 1978)		12 C.D. 77
(D.Del. 1978)	464 F.Supp. 1037	12 C.D. 439
(D.Del. 1980)	494 F.Supp. 770	14 C.D. 267
(D.Del. 1980)		14 C.D. 543
(3rd Cir. 1981)	662 F.2d 955	15 C.D. 363
Cert. denied (1982)	455 U.S. 908	
Reichhold Chemicals, Inc. v. FTC		
(4th Cir. 1979)		13 C.D. 158
Reinhardt, Charles E., and Union Circulation Co., Inc.; U.S. v.		
(N.D. Ga. 1982)		16 C.D. 317
Retail Credit Co. v. FTC		
(D.D.C. 1976)		10 C.D. 68
(D.D.C. 1976)		10 C.D. 305
(D.D.C. 1976)		10 C.D. 405
Retzloff Industries; U.S. v.		
(S.D. Tex. 1979)		13 C.D. 658
(S.D. Tex. 1980)		14 C.D. 546

Name of Case	Reference	Reported in
Reuben H. Donnelley Corp., The v. FTC		
(N.D.Ill. 1977)		11 C.D. 651
(N.D.Ill. 1977)		11 C.D. 733
(7th Cir. 1978)	580 F.2d 264	12 C.D. 231
(7th Cir. 1979)		13 C.D. 98
Rhinechem Corp.; FTC v.		
(N.D. Ill. 1978)	459 F.Supp. 785	12 C.D. 357
Riccardo Pagnini (America) Corp.; U.S. v.		
(S.D.N.Y. 1980)		14 C.D. 545
Rigler, Douglas V. v. FTC		
(D.D.C. 1981)		15 C.D. 15
Riley Co., Inc., The; U.S. v.		
(N.D. Ill. 1979)	474 F.Supp. 181	13 C.D. 221
Ritchie Rubber & Plastic Co., Inc.; U.S. v.		
(N.D. W.Va. 1982)		16 C.D. 501
R.J. Reynolds Tobacco Co., Inc.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 39
(S.D.N.Y. 1978)		12 C.D. 373
(S.D.N.Y. 1981)		15 C.D. 57
(S.D.N.Y. 1982)		16 C.D. 500
RJR Foods, Inc.; U.S. v.		
(N.D. Cal. 1981)		15 C.D. 516
Rockefeller, David; FTC v.		
(S.D.N.Y. 1977)	441 F.Supp. 234	11 C.D. 679
(S.D.N.Y. 1978)		12 C.D. 151
(2d Cir. 1979)	591 F.2d 182	13 C.D. 20
Roll Form Products, Inc.; U.S. v.		
(D. Mass. 1980)		14 C.D. 545
Rosenfeld, Ira and Intaltex, Ltd.; U.S. v.		
(S.D.N.Y. 1980)		14 C.D. 544
Rosen, Theodore & Talent, Inc.; U.S. v.		
(D. Mass. 1982)		16 C.D. 499
RSR Corp. v. FTC		
(9th Cir. 1979)		13 C.D. 1
(9th Cir. 1979)	602 F.2d 1317	13 C.D. 328
Cert. denied (1980)	445 U.S. 927	
(D.C. Cir. 1981)	656 F.2d 718	15 C.D. 141
Rubbermaid, Inc. v. FTC		
(6th Cir. 1978)	575 F.2d 1169	12 C.D. 67
Sadler Brothers Oil Co., Inc.; U.S. v.		
(E.D. Va. 1980)		14 C.D. 546
Safeway Stores, Inc.; U.S. v.		
(D. Md. 1976)		10 C.D. 519
(D. Md. 1977)		11 C.D. 756
Safeway Stores, Inc. v. FTC		
(D.D.C. 1977)	428 F.Supp. 346	11 C.D. 27

Name of Case	Reference	Reported in
Saks & Co.; U.S. v.		
(S.D.N.Y. 1976)	426 F.Supp. 812	10 C.D. 551
Saline, Marvin and Sure Products, Inc.; U.S. v.		
(DD.C. 1981)		15 C.D. 518
San Lorenzo Lumber Co.; U.S. v.		
(N.D. Cal. 1982)		16 C.D. 501
Schmidt Mfg. Co., Inc.; U.S. v.		
(D.S.C. 1981)		15 C.D. 521
SCM Corp. v. FTC		
(2d Cir. 1977)	565 F.2d 807	11 C.D. 739
(2d Cir. 1980)	612 F.2d 707	14 C.D. 23
Cert. denied (1980)	449 U.S. 821	
Scott, Edward W. and Donald F., d/b/a/ Opportunities Service Co., Inc.; U.S. v.		
(N.D. Ind. 1981)		15 C.D. 516
Sears, Roebuck and Co. v. FTC		
(9th Cir. 1982)	676 F.2d 386	16 C.D. 197
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Shaffner, Milton; FTC v.		
(7th Cir. 1980)	626 F.2d 32	14 C.D. 285
Shell Oil Co.; FTC v.		
(D.C. Cir. 1977)	555 F.2d 862	11 C.D 253
Cert. denied (1977)	431 U.S. 974	
Shepard, Horace A. and TRW, Inc. v. FTC		
(9th Cir. 1981)	647 F.2d 942	15 C.D. 149
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(D. Mass. 1979)		13 C.D. 394
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(N.D. Ala. 1982)		16 C.D. 219
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(N.D. Tex. 1980)		14 C.D. 211
(5th Cir. 1982)	665 F.2d 711	16 C.D. 21
Cert. denied (1982)	456 U.S. 973	
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Name of Case	Reference	Reported in
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(D. Conn. 1982)		16 C.D. 500
Standard Oil Co. v. FTC		
(N.D. Ind. 1979)		13 C.D. 122
(N.D. Ind. 1979)	475 F.Supp. 1261	13 C.D. 300
(N.D. Ind. 1980)		14 C.D. 343
(7th Cir. 1981)		15 C.D. 501
Standard Oil Co. of California, The v. FTC		
(9th Cir. 1978)	557 F.2d 653	12 C.D. 165
(9th Cir. 1979)	596 F.2d 1381	13 C.D. 178
(S.Ct. 1980)	449 U.S. 232	14 C.D. 501
Standard Oil Co. (Ohio), The; FTC v.		
(D.D.C. 1979)		13 C.D. 289
Standards Container Co. of Edgar, Inc.; U.S. v.		
(N.D. Ill. 1981)		15 C.D. 522
Stanke, Mary; FTC v.		
(N.D. Ill. 1980)		14 C.D. 227
Stanley R. Kaplan Educational Center, Ltd.; FTC v.		
(D. Mass. 1977)	433 F.Supp. 989	11 C.D. 465
StarCrest Products of California, Inc.; U.S. v.		
(C.D. Cal. 1982)		16 C.D. 502
State of California ex rel. C.B. Christensen v. FTC		
(9th Cir. 1977)	549 F.2d 1321	11 C.D. 151
Cert. denied (1977)	434 U.S. 876	
Stewart Lumber Co., Inc.; U.S. v.		
(E.D. Tenn. 1981)		15 C.D. 522
STP Corp.; U.S. v.		
(S.D.N.Y. 1978)		12 C.D. 501
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(D.N.J. 1981)		15 C.D. 121
Subscription Bureau Limited; U.S. v.		
(E.D. Va. 1976)		10 C.D. 565
Sunkist Growers, Inc. v. FTC		
(C.D. Cal. 1979)	464 F.Supp. 302	13 C.D. 57
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(D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253
Cert. denied (1977)	431 U.S. 974	
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(D.D.C. 1981)		15 C.D. 518
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(D. Mass. 1976)		10 C.D. 547
(1st Cir. 1977)	560 F.2d 1	11 C.D. 461

Name of Case	Reference	Reported in
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(D. Mass. 1982)		16 C.D. 499
Tallman Piano Store, Inc.; U.S. v.		
(D. Oreg. 1977)		11 C.D. 755
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(S.D. Ill. 1980)		14 C.D. 549
Ted Bates & Co., Inc. v. FTC		
(2d Cir. 1976)	532 F.2d 207	10 C.D. 138
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(2d Cir. 1982)	689 F.2d 346	16 C.D. 325
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Cert. denied (1977)	431 U.S. 974	
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(D.D.C. 1976)		10 C.D. 504
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(C.D. Cal. 1979)		13 C.D. 212
Tokyo Boeki (U.S.A.), Inc.; U.S. v.		
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(D. Minn. 1981)		15 C.D. 522
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(8th Cir. 1978)	586 F.2d 1275	12 C.D. 411
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(D.C. Cir. 1979)	617 F.2d 11	13 C.D. 448
Cert. denied (1980)	447 U.S. 921	

Name of Case	Reference	Reported in
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(E.D. Pa. 1977)	430 F.Supp. 95	11 C.D. 181
Trans World Accounts, Inc. v. FTC		
(9th Cir. 1979)	594 F.2d 212	13 C.D. 126
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(E.D. Wis. 1977)		11 C.D. 757
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(D.D.C. 1979)	479 F.Supp. 160	13 C.D. 417
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(9th Cir. 1981)	647 F.2d 442	15 C.D. 149
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(5th Cir. 1980)	609 F.2d 743	14 C.D. 7
(M.D. Fla. 1982)		16 C.D. 495
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United States (see name of other party)		
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(S.D.N.Y. 1981)		15 C.D. 523
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U.S. Home Corp.; U.S. v.		
(S.D. Tex. 1981)		15 C.D. 518

Name of Case	Reference	Reported in
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(5th Cir. 1979)	599 F.2d 1387	13 C.D. 380
USLIFE Credit Corp. v. FTC		
(5th Cir. 1979)	599 F.2d 1387	13 C.D. 380
Utah Bureau of Collections, Inc.; U.S. v.		
(D. Utah 1981)		15 C.D. 485
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(M.D. Fla. 1981)		15 C.D. 522
Vanguard Oil & Serv. Co., Inc.; U.S. v.		
(E.D.N.Y. 1980)		14 C.D. 547
Van Schaak & Co.; U.S. v.		
(D. Colo. 1982)		16 C.D. 499
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(E.D.N.Y. 1978)		12 C.D. 502
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(E.D. Va. 1981)		15 C.D. 519
Virginia Homes Manufacturing Corp.; FTC v.		
(D. Md. 1981)	509 F.Supp. 51	15 C.D. 19
Warner-Lambert Co. v. FTC		
(D.C. Cir. 1977)	562 F.2d 749	11 C.D. 601
Cert. denied (1978)	435 U.S. 950	
Watkins, Floyd T. and Trans World Accounts, Inc. v. FTC		
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(Wayne County Circuit, Mich. 1982)		16 C.D. 225
Wearly, W.L.; FTC v.		
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Wearly, W.L. v. FTC		
(D.N.J. 1978)	462 F.Supp. 589	12 C.D. 313
(D.N.J. 1978)		12 C.D. 467
(3d Cir. 1980)	616 F.2d 662	14 C.D. 127
Cert. denied (1980)	449 U.S. 822	
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(W.D. Pa. 1978)		12 C.D. 502
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Name of Case	Reference	Reported in
Weyerhaeuser Co.; FTC v.		
(D.D.C. 1981)		15 C.D. 89
(D.C. Cir 1981)	648 F.2d 739	15 C.D. 103
(D.C. Cir. 1981)	665 F.2d 1072	15 C.D. 391
(D.D.C. 1982)		16 C.D. 7
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(C.D. Cal. 1981)		15 C.D. 522
Whipple Brothers, Inc.; U.S. v.		
(M.D. Pa. 1977)		11 C.D. 756
Whitehill Systems, Inc.; U.S. v.		
(D. N.Y. 1977)		11 C.D. 755
Winters National Bank and Trust Co.; FTC v.		
(S.D. Ohio 1979)		12 C.D. 59
(6th Cir. 1979)	601 F.2d 395	13 C.D. 424
(S.D. Ohio 1980)		14 C.D. 149
(S.D. Ohio 1981)	509 F.Supp. 1228	15 C.D. 73
Womack Nursery Co., Inc. and Samuel E. Womack; U.S. v.		
(E.D. Tenn. 1981)		15 C.D. 516
Yamaha Motor Co., Ltd. v. FTC		
(8th Cir. 1981)	657 F.2d 971	15 C.D. 421
Cert. denied (1982)	456 U.S. 915	
Yeonas Co.; U.S. v.		
(E.D. Va. 1981)		15 C.D. 519
Young Ford, Inc. and Charles D. Young; U.S. v.		
(W.D. N.C. 1981)		15 C.D. 523
XYZ Law Firm v. FTC		
(N.D. Ga. 1981)	525 F.Supp. 1235	15 C.D. 509

FEDERAL TRADE COMMISSION v. INTERNATIONAL DIAMOND CORPORATION, THOMAS LEWSADER, STEVEN GREENBAUM, SUSAN GREENBAUM DOHRMANN, BERNHARD DOHRMANN and ANN KESSLER

No. C-81-29 MISC SAW FTC File No. 822 3006

United States District Court, Northern District of California
January 4, 1982

In an action arising from an FTC investigation of sellers of gemstones to determine whether they had engaged in trade practices or acts that violated Section 5 of the FTCA, court entered an order enforcing six civil investigative demands (CID's) served on defendants in connection with the investigation. Court held that FTC's inquiry and issuance of CID's (five calling for oral testimony by individual defendants, and one seeking from International Diamond Corporation production of various documents described in 26 Specifications) were within Commission's authority; nature of investigation had been made known to defendants; and list of documents demanded was reasonably relevant to the subject matter of the inquiry. Court further asserted that while defendants had alleged that CID's were burdensome, they had failed to show that they were *unduly* burdensome, or that compliance would disrupt or seriously hinder normal business operations. In declining to rule on Diamond's allegation that production of sought documents would destroy their confidentiality, court noted that this was not the proper stage to raise such objection. The FTC Improvements Act provided detailed procedures for protecting information claimed to be confidential, and allowed such data to be marked and withheld pending a determination of confidentiality by FTC and the district court. However, the Act does not permit noncompliance with the CID in its entirety. Diamond was ordered to produce requested documents, and individual defendants to give oral testimony as required.

ORDER

By WEIGEL, *District Judge*:

Defendants are International Diamond Corporation (Diamond) and five individual officers or employees of Diamond, which is a California corporation engaged in the nationwide business of selling investment grade diamonds to the public. This matter arises from an investigation undertaken by plaintiff Federal Trade Commission (FTC) of sellers of gemstones to determine whether they are engaging, or have engaged, in any unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45.

Pursuant to a resolution of September 2, 1980, authorizing the use of compulsory process in the investigation, the FTC served civil investigative demands (CID) on defendants on September 5, 1980. Five of the CID's

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[*] Not otherwise reported.

call for oral testimony from the individual defendants, described in twenty-six Specifications, as modified by letter of November 25, 1980. Upon application by the FTC, United States Magistrate Woelflen issued an Order on April 10, 1981, requiring Diamond to comply with the sixth CID, as modified, in its entirety. Defendants appealed the enforcement order to the United States Court of Appeals, for the Ninth Circuit. The case is here on remand from the Ninth Circuit, with directions to consider any objections filed to the magistrate's enforcement order. Objections have been filed, and a *de novo* review having been conducted, the Court concludes that the CID served upon Diamond is valid and should be enforced.

The FTC Act authorizes the FTC "[t]o gather and compile information concerning the conduct, practices and management of any person, partnership or corporation engaged in or whose business affects commerce * * *." 15 U.S.C. § 46(a). Its broad authority to gather information was augmented in the Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act), 15 U.S.C. § 57b-1, which empowers the FTC to issue CID's requiring the production of documents and testimony of witnesses relating to matters under investigation. Under the FTC Improvements Act, the FTC may issue a CID "[w]henever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce * * *." 15 U.S.C. § 57b-1(c)(1). The procedure "does not imply that the Commission must possess a minumum quantum of evidence before it issues a CID." 1980 Code Cong. & Admin. News, p. 1125. The CID must state "* * * the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 15 U.S.C. § 57b-1(c)(2). Moreover, a CID for the production of documents must

> (A) describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified;
> (B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproducing; and
> (C) identify the custodian to whom such material shall be made available.

15 U.S.C. § 57b-1(c)(3).

Diamond objects to the CID on the ground, *inter alia,* that the FTC failed to comply with the statutory requirements of Section 57b-1. This objection is meritless. The nature of the conduct under investigation is adequately described as being

> [m]isrepresentations or failure to disclose material facts concerning the quality, value and investment potential of gemstones in connection with the advertising, offering for sale, or distribution of gemstones throughout the United States. CID, September 4, 1980, p.1.

The provision of law applicable to such violation is specified as Section 5 of the FTC Act, 15 U.S.C. § 45. The twenty-six (26) precise specifications describe the materials to be produced with "such definiteness and certainty as to permit such material to be fairly identified." A reasonable return date of ten days was prescribed—though now exceeded by over one year—and a custodian was identified. As the legislative history shows, the statutory requirements are "* * * not intended to be overly strict so as to defeat the purpose of the act or to breed litigation * * * ." 1980 U.S. Code Cong. & Admin. News, p. 1125. The CID fully meets the requirements of Section 57b-1.

Diamond also urges that the CID is invalid because (1) it is unreasonable in scope and fails to describe with particularity the subject being investigated in violation of the Fourth and Fourteenth Amendments, (2) it is unduly burdensome, (3) it fails to protect the confidentiality of documents, and (4) the material sought in the enumerated specifications is not relevant to the subject matter of the investigation.

Diamond's constitutional challenge merits little discussion in light of the clear case authority upholding the constitutionality of agencies' broad investigative powers. See, *United States v. Morton Salt Co.,* 338 U.S. 632 (1950); *Appeal of FTC Line of Business Report Litigation,* 595 F.2d 685 (D.C.Cir.), *cert. denied,* 439 U.S. 958 (1978); *Petition of Gold Bond Stamp Company,* 221 F.Supp. 391 (D.Minn. 1963),*aff'd, Gold Bond Stamp Co. v. United States,* 325 F.2d 1018 (8th Cir. 1964) (*per curiam*); *Hyster Co. v. United States,* 338 F.2d 183 (9th Cir. 1964). Since "[t]he scope of the Commission's CID is to be the same as under the Antitrust Civil Process Act," 1980 U.S. Code Cong. & Admin. News, p. 1125, the reasoning of *Petition of Gold Bond Stamp* and *Hyster,* upholding the constitutionality of CID's issued under the Antitrust Civil Process Act, applies here. In those cases, the CID's were found sufficiently certain for Fourth Amendment purposes,

> [i]f the proceeding is within the purview of authority * * * and if the nature of the inquiry * * *, is made known to the person investigated and the list of documents demanded is reasonably relevant to the investigation * * * . *Petition of Gold Bond Stamp, supra* at 396.

The investigation of sellers of gemstones in the instant case is within the purview of the FTC, the nature of the inquiry is made known to Diamond, and the list of documents demanded is reasonably relevant to the investigation, as more fully discussed below.

Diamond's second objection—burdensomeness—must also fail. It is not enough to show that the CID imposes a burden, since "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco Inc.,* 555 F.2d 862, 882 (D.C. Cir.), *cert. denied,* 431 U.S. 974 (1977). Rather, Diamond has the burden of showing that the request is "*unduly* burdensome."*Id.* at 882. "Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* at 882.

Diamond has failed to show that "* * * compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Id.* at 882. It speculates that it will require three persons working full time at least one month to comply with Specification 5, apparently the most burdensome specification. Even if such speculation were correct, the burden on Diamond is not so great as to require quashing the CID. Courts have upheld far more burdensome requests for documents than the instant one. *FTC v. Texaco, supra* at 992 (compliance estimated to require sixty-two man-years of search time at a cost of four million dollars); *Appeal of FTC Line of Business Report Litigation, supra* at 704 (document production estimated to cost from $150,000 to $700,000 (1977-2 Trade Cas. at 72151-52) held to be *de minimis* in relation to the size of the corporations).

The third objection is that production of the documents will destroy their confidentiality. This is not the proper stage to raise such an objection. The FTC Improvements Act provides detailed procedures for protecting information claimed to be confidential. 15 U.S.C. § 57b-2. Although there is doubt whether materials containing the names of customers and sales representatives, salaries of employees, cost and profit information and in-house computer programs are "confidential," as Diamond claims, Diamond's remedy is to be found in Section 57b-2(c)(1). That section allows documents considered to be confidential to be marked and withheld, pending a determination of confidentiality first, by the FTC, and subsequently, by a district court. It does not permit noncompliance with the CID in its entirety.

Finally, Diamond objects to the CID on the ground that the material designated for production in the twenty-six specifications is not relevant to the subject matter of the investigation. The legislative history states "the information sought must have *some materiality* to the investigation." 1980 U.S. Code Cong. & Admin. News, p. 1126, *emphasis added.* "The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution." *FTC v. Texaco Inc., supra* at 874.

The FTC resolution states that the scope and purpose of the FTC investigation is to determine whether sellers of gemstones may be engaging, or may have engaged, in any unfair or deceptive acts in connection with the advertising, offering for sale, sale or distribution of gemstones. Without discussing each of the twenty-six specifications separately, it is clear that the material sought is relevant to the FTC investigation. Documents relating to the sales of diamonds, appraisals, advertising materials, pricing methods, etc., obviously have "some materiality" to the investigation. While advertising materials show what representations have been made to the public, other documents relating to cost and profit information, pricing, appraisals, etc., are necessary to confirm the bases of the representations. The specifications were discussed at length in the prior hearing before Magistrate Woelflen. Reporter's Transcript of Proceeding, April 10, 1981. Upon a *de novo* review of the objections there raised and discussed, the Court is satisfied that the information sought is relevant.

Accordingly, in light of all of the foregoing,

IT IS HEREBY ORDERED that defendant International Diamond Corporation fully comply with all specifications of the civil investigative demand for documents, as modified, within twenty days;

IT IS FURTHER HEREBY ORDERED that the individual defendants Thomas Lewsader, Steven Greenbaum, Susan Greenbaum Dohrmann, Bernhard Dohrmann, and Ann Kessler, thereafter appear before a duly designated investigator of the Federal Trade Commission at a date, time and place to be determined, and give such oral testimony as is required by the civil investigative demands.

[illegible] tions were discussed at length in the prior hearing before Magistrate Wickham Roberts's [illegible] of Proceedings [illegible] April 10, 1985 [illegible]

[illegible] International Diamond Corporation fully comply with [illegible] of the civil investigative demand [illegible]

[illegible] Federal Trade Commission [illegible]

The third objection is that [illegible]

Finally, [illegible]

The FTC [illegible]

FEDERAL TRADE COMMISSION
v.
WEYERHAEUSER COMPANY et al.*

Civ. A. No. 80-3175 FTC File No. 801 0181

United States District Court, District of Columbia
January 6, 1982

In an action seeking to enjoin Weyerhaeuser's acquisition of certain assets of Menasha Corp., a family-owned producer of corrugated containers, Court, by order issued March 25, 1981, denied FTC's motion for a preliminary injunction and allowed the parties to consummate the acquisition subject to certain provisions governing defendants' ownership of the North Bend medium mill. After considering the record, and parties' submissions pursuant to Paragraphs III(2) and III(4) of the March 25, 1981 order, Court issued an order dismissing Menasha Corp. as a defendant and finalized its hold-separate order. The order requires that until the Commission's proceeding comes to a conclusion, Weyerhaeuser may not take any action which could impair its ability to comply with an order which the Commission may issue requiring divestiture of the North Bend, Oregon corrugating medium mill as a separate, independent, viable operating enterprise. To that end, the Court's order requires Weyerhaeuser to insulate itself from the management, supply, production, sales, and pricing decisions of the mill.

Before PRATT, *District Judge*:

ORDER

Pursuant to the motion of Menasha Corporation, and upon consideration of the record and proceedings herein and considering the arguments of the parties and the court being duly advised in the premises and it appearing that there is no valid reason why Menasha Corporation should be continued as a party to this proceeding, it is by the court this sixth day of January, 1982

Ordered that the motion to dismiss the action against Menasha Corporation is hereby granted.

ORDER

Plaintiff, Federal Trade Commission (the Commission), having filed its complaint herein on December 12, 1980, and having moved for a preliminary injunction herein, and a hearing having been held on this motion; and the Commission having filed an administrative complaint on February 18, 1981; and

The Court, having by order of March 25, 1981, determined that, in light of the relief granted in said order, the Commission failed to show that the public interest entitled it to the relief sought under § 13(b) of the Federal

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*Not otherwise reported.

Trade Commission Act, 15 U.S.C. § 53(b), and therefore having denied the Commission's motion for relief under that section; and

The Court, in the exercise of its inherent equitable powers, having permitted the parties to proceed with consummation of the acquisition in accordance with the acquisition agreement of December 24, 1980, subject to certain provisions governing defendant Weyerhaeuser Company's (Weyerhaeuser) ownership of the North Bend medium mill pending further order of the Court; and

The Court having considered the submission of the parties concerning such additional measures, which they wish to propose for the Court's consideration pursuant to paragraphs III(2) and III(4) of the order of March 25, 1981, it is this sixth day of January, 1982,

I.

ORDERED that until such time as the Commission's administrative proceeding is dismissed or until any order of divestiture entered therein has become final as provided in 15 U.S.C. §§ 21 and 45, Weyerhaeuser shall not take any action, directly or indirectly, which would impair its ability to comply with any order which the Commission may issue requiring Weyerhaeuser to divest ownership of the North Bend, Oregon corrugating medium mill as a separate, independent, viable operating enterprise.

II.

ORDERED that until such time as the Commission's administrative proceeding is dismissed or until any order of divestiture entered therein has become final as provided in 15 U.S.C. §§ 21 and 45, Weyerhaeuser shall cause the North Bend mill to be maintained and operated as a separate and ongoing enterprise in order to avoid interim competitive harm and to ensure that the mill will be capable of being divested as a viable competitor in the West Coast corrugating medium market, and toward that end:

1. Weyerhaeuser shall take no action, direct or indirect, which would prevent the North Bend mill from being maintained and operated as a separate and ongoing entity. Weyerhaeuser shall be able to change the name of the mill and any signs or other insignias on the mill and the mill's premises to reflect Weyerhaeuser's ownership of the North Bend mill.

2. Weyerhaeuser shall take no action, direct or indirect, which would reduce annual production at the North Bend mill, except that Weyerhaeuser shall not be responsible for any failure of the mill to produce medium at existing levels as the proximate result of (a) any circumstances beyond Weyerhaeuser's control, such as an act of God, fire, flood, war, government action, or labor trouble or (b) a substantial reduction in demand for containerboard. Production of medium shall not be reduced because of a

reduction in demand for containerboard without Weyerhaeuser or North Bend or both making application and receiving approval from the Court after at least ten (10) days prior notice to Commission counsel. To monitor compliance with this provision, Weyerhaeuser shall, by the 15th of each month, submit verified reports in writing to Commission counsel setting forth (a) the daily and monthly production of corrugating medium for the preceding month and for the corresponding month of the preceding year by the North Bend mill and (b) any plans to increase or decrease the production of medium at the North Bend mill. Such reports shall be maintained in strict confidence by the Commission and Commission counsel.

3. Nothing shall prohibit Weyerhaeuser from: (a) increasing the North Bend mill's productive capacity; (b) suggesting various cost-saving procedures or physical or technical improvements at the mill; and (c) providing such operational and environmental analysis assistance and other staff services as may be requested by the mill manager, all provided that no action shall be inconsistent with the underlying purpose of this order as set forth in paragraphs I and II of this order.

4. Weyerhaeuser shall not, directly or indirectly, change or attempt to change the North Bend mill's present management. Mill management shall mean the mill manager, production manager, plant engineer, utility and wood yard superintendent, technical director, personnel manager, and raw materials manager. The mill manager, with the assistance of said mill management and of Weyerhaeuser, shall have control of the operations of the North Bend Mill, including but not limited to the acquisition of raw materials, production and marketing of corrugating medium and all decisions as to the price at which medium from the North Bend mill is traded or sold. The mill manager shall have the authority to employ any additional personnel and to seek Weyerhaeuser's assistance, both at Weyerhaeuser's expense, in order to ensure compliance by North Bend with the provisions of this order. Weyerhaeuser shall not offer to employ or employ any of the mill's management at any other Weyerhaeuser location. Nothing herein shall, however, prohibit the mill manager, in his sole discretion, from changing any of the mill management or prohibit any of the mill's management from voluntarily terminating his or her employment by electing to retire or otherwise. In the event that any of the mill management (other than the mill manager) decides to terminate his or her employment or retires, the mill manager, subject to the approval of Weyerhaeuser (which approval shall not be unreasonably withheld) shall be permitted to designate a replacement, provided that any such person shall be subject to the terms and conditions of this order and that Commission counsel shall be advised as soon as practicable of any such management change. If the mill manager decides to terminate his employment or retire, Weyerhaeuser shall select a replacement subject to approval of the court after at least ten (10) days prior notice to Commission counsel. Notices provided pursuant to this paragraph will

be kept in strict confidence by the Commission and Commission counsel. No replacement mill managerial employee shall have been recently employed by Weyerhaeuser within the prior five years or own stock in Weyerhaeuser. All mill personnel shall be entitled to participate in Weyerhaeuser employee benefit plans.

5. The North Bend mill shall not give Weyerhaeuser container plants preference in the supply of medium during the pendency of the Commission's proceedings. North Bend, with the assistance of Weyerhaeuser, shall continue all existing trades and open market sales in which North Bend is engaged to the extent trading partners and purchasers are willing to maintain those agreements on commercially reasonable terms. To the extent that new or additional trade arrangements or sales are to be made, North Bend personnel with the assistance of Weyerhaeuser, may arrange such trades or sales transactions, provided no preference shall be given to Weyerhaeuser container plants but the North Bend mill may deliver additional medium to or for the benefit of Weyerhaeuser container plants in the event there is no other commercially reasonable alternative. As stated previously, the mill manager shall decide the price at which medium from the North Bend mill shall be traded or sold. To monitor compliance with this provision, Weyerhaeuser shall, by the 15th of each month, submit verified reports in writing to Commission counsel setting forth (a) the percentage of the North Bend mill shipments for the preceding month and for the corresponding month of the preceding year that were delivered to Weyerhaeuser container plants through open market sales or through exchanges; and (b) setting forth the daily and monthly production of corrugating medium for the preceding month and the corresponding month of the preceding year by its Longview, Washington and Valliant, Oklahoma, corrugating medium mills and describing any plans to increase or decrease the production or production capacity of said mills.

6. Weyerhaeuser shall maintain separate financial and operating books and records for the North Bend mill and shall prepare a separate financial statement for the mill. Weyerhaeuser shall provide Commission counsel with quarterly and annual financial statements for the North Bend mill which, as in the case of the annual report, shall be audited and certified by Weyerhaeuser's independent certified public accountants and which shall be maintained in strict confidence by the Commission and Commission counsel.

7. Net earnings or profits of the North Bend mill may be retained by Weyerhaeuser. Weyerhaeuser shall not take any action which could reasonably be expected to diminish the profits, or profitability, of the North Bend mill or to intercept any business opportunities of the mill. By February 5, 1982, Weyerhaeuser shall report to the Court and Commission counsel any definite plans for the expansion of the North Bend mill's productive capacity and such information thereafter shall be included as part

of every third verified monthly report required by paragraph II(2) of this order. Weyerhaeuser shall take all steps necessary to maintain the North Bend mill in good working condition. Weyerhaeuser shall not knowingly cause or permit the deterioration of the North Bend mill in any manner that impairs the ultimate divestibility of the mill.

8. None of the equipment or other aspects of the North Bend mill shall be sold or otherwise disposed of, except in the ordinary course of business. Weyerhaeuser shall not mortgage, pledge, or incur liens against the North Bend mill or a portion thereof as security for any indebtedness of Weyerhaeuser or pursuant to any loan transaction unless the proceeds are utilized entirely for the mill's operation. Weyerhaeuser shall not encumber the North Bend mill with any obligations, except that Weyerhaeuser may mortgage, pledge or incur liens against the North Bend mill pursuant to a loan transaction, provided that the proceeds are used solely for the benefit of the mill. On or before January 15, 1982, Weyerhaeuser shall notify Commission counsel of all existing mortgages, pledges, liens, or other encumbrances against the North Bend mill.

9. Weyerhaeuser will hold in strict confidence and will not divulge to any third party, except as may be required by law, or use itself, any material confidential information about the North Bend mill which Weyerhaeuser may obtain from its ownership of the mill. "Material confidential information" shall refer to information not independently known to Weyerhaeuser, and which is competitively significant, including but not limited to supplier or customer lists and know-how. Nothing herein shall prohibit Weyerhaeuser from taking appropriate steps in the event of a final order of divestiture to ensure that any material confidential information concerning Weyerhaeuser, previously provided to the mill's management, is kept confidential.

10. For the purpose of ensuring compliance with this order, Commission counsel or other authorized representatives shall be permitted, upon written request and on reasonable notice to Weyerhaeuser, (a) access, during office hours of Weyerhaeuser or North Bend, to all ledger books, accounts, correspondence, memoranda and other documents in the possession or under the control of Weyerhaeuser or North Bend relating to any matters contained in this order reasonably necessary to the monitoring of this order, and (2) to interview appropriate officers and employees of Weyerhaeuser and managerial personnel of the North Bend mill, at their place of employ or at another mutually agreeable site, in the presence of counsel for Weyerhaeuser, regarding matters not privileged which are covered by this order.

III.

ORDERED that the provisions of this order applicable to Weyerhaeuser shall apply to Weyerhaeuser and each of its subsidiary corporations and each of their directors, officers, employees, and agents, and to each of their successors and assigns, to North Bend's managerial employees and agents and to all other persons in active concert or participation with Weyerhaeuser or North Bend who shall have received notice of this order by personal service or otherwise, and it is

FURTHER ORDERED that this Court shall retain jurisdiction for the purpose of enabling any of the parties to this Order to apply to this Court at any time for such further orders and directions as may be necessary for the construction or carrying out of this Order, for any modification in the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

EDWARD J. FLEMING, III et al.
v.
FEDERAL TRADE COMMISSION et al.*

MILTON BRADLEY COMPANY et al.
v.
FEDERAL TRADE COMMISSION et al.*

Nos. 81-1019, 81-1020 FTC File No. 761 0087

United States Court of Appeals, District of Columbia Circuit
January 12, 1982

1. **Under the FTCIA, a civil antitrust damage suit brought by state attorney general qualifies as an "official law enforcement purpose" warranting disclosure.**

A civil antitrust damage suit brought by state attorney general qualifies as an "official law enforcement purpose" for disclosure under the Federal Trade Commission Improvements Act.

2. **If statutory prerequisites are satisfied, FTC decisions to release materials are discretionary in nature and exempt from judicial review.**

Decisions by the Federal Trade Commission to release materials are discretionary in nature and exempt from judicial review so long as statutory prerequisites are satisfied.

3. **In releasing information obtained through proper exercise of compulsory process and oral testimony to state law enforcement agencies for use in civil antitrust damage action, FTC acted within its discretion.**

Federal Trade Commission acted within its discretion in procuring documentary materials by exercise of compulsory process and oral testimony and subsequently releasing that information to state law enforcement agencies for use in civil antitrust damage action.

Vice-president of company and company brought suit seeking temporary restrain[312]ing order and preliminary and permanent injunction against release of certain documentary materials received by Federal Trade Commission by exercise of compulsory process. The United States District Court for the District of Columbia, Thomas A. Flannery, J., denied application for injunctive relief and granted Commission's motion for summary judgment, and company and vice-president appealed. The Court of Appeals, Mikva, Circuit Judge, held that Commission acted within its discretion in procuring documentary materials by exercise of compulsory process and oral testimony and subsequently releasing that information to state law enforcement agencies for use in civil antitrust damage action.

Affirmed.

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*Reported in 670 F.2d 311 (1982).

(Syllabus, with substituted captions, taken from 670 F.2d 311)

Francis D. Dibble, Jr., Springfield, Mass., with whom *Charles S. Cohen* and *Richard P. Bock*, Springfield, Mass., for Edward J. Fleming, III, and *Charles A. Tobin*, and *Edward A. Geltman*, for Milton Bradley Co., were on the brief for appellants.

Joanne L. Levine, Atty., F.T.C. Washington, D.C., with whom *Charles F.C. Ruff,* U.S. Atty., *Royce C. Lamberth, Kenneth M. Raisler, Valerie K. Schurman,* Asst. U.S. Attys., *Ernest J. Isenstadt,* Acting Gen. Counsel, F.T.C., and *W. Dennis Cross,* Asst. Gen. Counsel, F.T.C., Washington, D.C., were on the brief, for appellees.

Charles O. Monk, II, Asst. Atty. Gen., State of Md., Baltimore, Md., with whom *Mark D. Gately,* Asst. Atty. Gen., State of Md., Baltimore, Md., *William J. Guste, Jr.,* Atty. Gen., State of La., New Orleans, La., *Robert Abrams,* Atty. Gen., State of N.Y., New York City, *Mark White,* Atty. Gen., State of Tex., Austin, Tex., *Judith W. Rogers,* Corp. Counsel, District of Columbia, *Charles Reischel,* Deputy Corp. Counsel, District of Columbia, and *Timothy J. Shearer,* Asst. Corp. Counsel, District of Columbia, Washington, D.C., were on the brief, for appellees States, et al.

Before J. EDWARD LUMBARD, *Senior Circuit Judge* for the Second Circuit,* and ROBB and MIKVA, *Circuit Judges.*

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, *Circuit Judge*:

These consolidated appeals present issues of first impression to this court under the Federal Trade Commission Improvements Act of 1980 (the Improvements Act). During its investigation of anticompetitive activities (price fixing) in the school art supplies field, the Federal Trade Commission (FTC) procured documentary materials by **[313]** the exercise of compulsory process from the Milton Bradley Company and obtained oral testimony from Edward Fleming in his capacity as a vice-president of Milton Bradley.[1] Pursuant to its policy of cooperation with state law enforcement agencies,[2] the FTC agreed to make these materials available to state attorneys general who requested these materials in accordance with Sections 6(f) and 21(b)(6) of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f), 57b-2(b)(6) (Supp. IV 1980).[3] On September 12, 1980, Fleming and Milton Bradley brought suit in the District Court seeking a temporary restraining order and preliminary and permanent injunctions against release of this information without their consent.[4] The District Court denied the application for injunctive relief and granted the Commission's motion for summary judgment. We affirm the decision of the District Court as consistent with the statute and the legislative aim of promoting the efficient flow of information from the FTC to state law enforcement agencies.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] *See in re Binney and Smith, Inc., et al.*, FTC File No. 761-0087. Appellants maintained that some of these materials contained confidential commercial and financial information. The District Court found this not to be a material issue, but assumed arguendo, that some of the materials might be competitively sensitive. *See* Findings of Fact and Conclusions of Law, Nov. 10, 1980, Joint Appendix (J.A.) 289, 291.

[2] 16 C.F.R. § 4.6 (1980).

I. BACKGROUND

Under 15 U.S.C. § 46(a) (Supp. IV 1980), the FTC, in carrying out its mandate to ferret out any unfair competition and unfair or deceptive trade acts or practices in or affecting commerce,[5] may conduct investigations of any person or entity whose business or activities affect commerce. Prior to the amendment of § 6(f) in 1980, the Commission was authorized to disclose information so acquired as it deemed expedient in the public interest, except for trade secrets and names of customers.[6] The Commission also assumed the authority under § 6(f), despite the lack of specific authorization, to make non-public disclosures of confidential information in its files to state attorneys general investigating similar activities or practices.[7] Although the Commission's exercise of such authority was affirmed by several district courts, the efficacy of the Commission's disclosure policy was severely diminished by the inexorable litigation attendant to its disclosure decisions.[8]

The 1980 Improvements Act amended § 6(f) of the Federal Trade Commission Act and added § 21(b)(6). The sections specifically authorize the Commission to make available to state law enforcement officials confidential information acquired pursuant to FTC investigatory powers upon the certification of such officials that the information will be maintained in confidence and [314] used only for official law enforcement purposes.[9] The legislation thus codified the Commission's theretofore presumed authority and concomitant policy to share nonpublic information with state law enforcement officials.

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[3] At least some of the access requests were pending when the Improvements Act, Pub. L. No. 96-252, 94 Stat. 374 (1980), went into effect. Section 6(f), as amended, and the newly added § 21(b)(6), are applicable. See Memorandum Opinion, Nov. 24, 1980, J.A. 304, at 313-14 nn. 7 & 8, for explication of the interplay between § 6(f) and § 21(b)(6). *See Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 508 n.4 (7th Cir. 1981).

[4] Access was granted on the condition that any public use of the documents would be cleared by the FTC General Counsel's Office. J.A. 245. Appellants also sought to enjoin the FTC from granting permission to any state attorneys general in possession of the materials to release such material to any person for any purpose or to use such materials in connection with any private civil treble damage suits or other litigation. *See* Plaintiffs' Supplemental Statement of Relief Sought Under Preliminary Injunction, Oct. 1, 1980, J.A. 229, 230.

[5] *See* 15 U.S.C. § 45(a) (1976).

[6] Prior to its amendment by the Improvements Act, Section 6(f) empowered the Commission "to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest . . . ." 38 Stat. 721 (1914) (current version at 15 U.S.C. § 46(f) (Supp. IV 1980)).

[7] *See* note 2 *supra*.

[8] *See, e.g., Interco, Inc. v. FTC*, 490 F.Supp. 39 (D.D.C.1979); *Martin Marietta Corp. v. FTC*, 475 F.Supp. 338 (D.D.C.1979). *See generally Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 507-08 (7th Cir. 1981).

The Commission has furnished the materials obtained in its investigation of Milton Bradley and others to several state attorneys general who have complied with §§ 6(f) and 21(b)(6).[10] One of the intended uses of these materials was to be in civil treble damage antitrust suits brought by the attorneys general on behalf of their states or divisions thereof as purchasers of art supplies for their schools.[11] It is this intended use of the materials furnished by the FTC that underlies appellants' appeal. Sections 6(f) and 21(b)(6) authorize disclosure of confidential information to state law enforcement officials only upon the certification of the state official that the information will be used solely for official law enforcement purposes. Appellants' major contention is that a civil treble damage suit, even though brought by the state attorney general, is not an official law enforcement purpose and therefore release of the material for such an improper use violates §§ 6(f) and 21(b)(6) of the Act. Appellants also contend that the language of §§ 6(f) and 21(b)(6), specifically the term "may disclose," bespeaks a congressional imperative that the Commission engage in an elaborate balancing test prior to disclosure, and that the Commission's failure to engage in such a process evinced a failure to exercise any discretion by the Commission. Finally, appellants maintain that the Commission's disclosure decision is subject to full judicial review.

II. ANALYSIS

The cornerstone of appellants' argument is that a civil antitrust suit brought by a state attorney general does not constitute an official law enforcement purpose under §§ 6(f) and 21(b)(6) of the Act. To support this contention appellants characterize the treble damage remedy as primarily remedial and private in nature, alleging that the residual punitive effects are merely an incidental function of the remedy and do not rise to the level of official law enforcement. Appellants assert that whereas the treble damage suit is remedial and compensatory in nature, law enforcement must be punitive or prophylactic. Although this analysis may be accurate in the context of private litigation, it cannot account for the clear **[315]** implication in the legislative history of §§ 6(f) and 21(b)(6) that official law enforcement purposes include civil treble damage actions brought by state attorneys general. The simplistic dichotomy proposed by appellants ignores the inherent ambiguity of the treble damage action, which clearly represents a confluence of all these characteristics. The Supreme Court recently noted that "the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . . ." Conversely, it also recognized the "remedial" nature of what appellants assert are strict law enforcement actions, including criminal, injunctive, and administrative proceedings. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-643, 101 S.Ct. 2061, 2066-2068, 68 L.Ed.2d 500 (1981). A civil antitrust suit brought by a state may not be a traditional method of law enforcement but the congressional intent to promote sharing among various law enforcement levels and thereby eliminate costly duplication of effort cannot be limited by tradition.

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[9] Amended § 6(f) provides that the Commission has power

> to make public . . . such portions of the information obtained by it hereunder as are in the public interest . . . *Provided*, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

15 U.S.C. § 46(f) (Supp. IV 1980). Section 21(b)(6), in relevant part, provides:

> The custodian may make such materials available to any State law enforcement agency upon the prior certification of any officer of such agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

15 U.S.C. § 57b-2(b)(6) (Supp. IV 1980).

[10] The parties entered into a Stipulation and Order establishing a procedure for limiting further disclosure of the materials during the pendency of this action that was approved by the District Court on October 2, 1980. J.A. 247, 308.

[11] At least eleven states that have requested access to the FTC's investigative files are engaged in civil antitrust litigation for treble damages and ancillary relief against Milton Bradley and other companies under Sections 4 & 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Some of those suits also allege pendent state antitrust law violations. *See* J.A. 293, 307. These cases were assigned to the Judicial Panel on Multidistrict Litigation and were consolidated for pretrial proceedings in the Northern District of Ohio on August 5, 1980. *In re Art Materials Antitrust Litigation*, M.D.L. No. 436 (N.D. Ohio). The FTC has received requests for access to the investigative file at issue from at least 28 state attorneys general and the Corporation Counsel of the District of Columbia. J.A. 306.

[1] Prior to the passage of the Improvements Act in 1980, the Commission faced a continuing uphill struggle in the effort to carry out a policy of sharing its investigative materials with state law enforcement officials. Under the unamended § 6(f) the Commission could make public information it obtained, other than trade secrets and names of customers, as it deemed expedient in the public interest. Judicial decisions interpreting the old § 6(f) and its legislative history also found clear authorization for the Commission's nonpublic release of trade secrets and names of customers,[12] but the Commission was severely constrained in its cooperative endeavors by the onerous litigation attendant to those disclosure efforts. Two rather egregious cases seem to have precipitated the amendment of § 6(f) and the addition of § 21(b)(6) in the 1980 Improvements Act. As stated by one of the Act's sponsors, Representative Preyer:

> The purpose of these provisions is to make it crystal clear that the Commission has this authority and that it should be able to exercise it without undue delay and restraint. It is intended to prevent situations like those occurring in two recent cases. In one, Interco, Inc. against FTC, it took some 17 months of litigation before the Commission was free to disclose documents to more than 20 State attorneys general. In another, Martin Marietta Corp. against FTC, the Commission spent 4 months discussing the proposed disclosure with company personnel, then was enjoined from disclosing the document for another 8 months before the Com-

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[12] *See Interco, Inc. v. FTC*, 490 F.Supp. at 44-45; *Jaymar-Ruby, Inc. v. FTC*, 651 F.2d at 508.

> mission could disclose it. By clarifying the law, we hope to put an end to litigation of this type which needlessly delays and hampers the ability of our State attorneys general to protect the citizens of their States.

126 Cong.Rec. H3870 (daily ed. May 20, 1980). In *Martin Marietta Corp. v. FTC,* 475 F.Supp. 338 (D.D.C. 1979), as the District Court noted below, the Commission was finally upheld in disclosing information to a state attorney general for use in an antitrust civil damage suit. This explicit approval of the ultimate decision in *Martin Marietta* manifests Congress' understanding that disclosure for this purpose is within the spectrum of law enforcement that the Improvements Act was intended to facilitate. There is no doubt that a civil antitrust damage suit brought by a state attorney general qualifies as an official law enforcement purpose for disclosure under the FTC Act.

[2] The legislative history also persuades us of the error of appellants' contention that §§ 6(f) and 21(b)(6) require the Commission to conduct an elaborate balancing test of competing interests prior to disclosure. As a necessary corollary, we conclude that the scope of judicial review is limited to the Commission's compliance with the statutory prerequisite of a certification of confidentiality and use only for official law enforcement purposes. In so deciding we follow the Seventh Circuit's decision in *Jaymar-Ruby v. FTC,* 651 F.2d 506 (7th Cir. 1981), the only other case that **[316]** has yet arisen under the relevant sections of the Improvements Act. In *Jaymar-Ruby,* which also involved requests by state attorneys general for access to FTC investigative files, the Seventh Circuit held that "based on our analysis of the language, legislative history and purpose of the Improvements Act, we hold that the Commission decisions to release materials pursuant to § 6(f), as amended, are discretionary in nature and exempt from judicial review so long as the two statutory prerequisites are satisfied." *Id.* at 512.[13]

The Seventh Circuit's decision is buttressed by a congerie of statements in the legislative history of the Improvements Act revealing a clear congressional intent to allow the Commission to continue its policy of sharing information with state attorneys general free from the expansive and burdensome litigation and delay that had so complicated disclosure under the unamended Act. Nonetheless, appellants urge that we reject the thorough analysis of *Jaymar-Ruby* and fashion a balancing standard for the Commission merely because the Congress used the term "may disclose" as opposed to an imperative form such as "shall." Such a balancing test would assertedly weigh the need of the state for the information, the potential harm from the submitting party from disclosure, alternate means of obtaining the material to be disclosed, and presumably the public interest in disclosure. The Commission's exercise of discretion within the bounds of this test would accordingly be subject to full judicial review. Such a test, however, rather than expediting the flow of information as the amendments were unarguably designed to do, would in fact render disclosure even more difficult than it was when the Commission merely presumed its authority under the unamended Act.

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[13] The Court also held that the disclosure decision is committed to agency discretion under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), and that the decisional process is entrusted to the expertise of the Commission. 651 F.2d at 510 12.

A balancing standard, and its attendant contraints on the Commission's discretionary authority, would impose an untoward burden on the Commission in conflict with the clear policy behind the Improvements Act. The legislative history is consistent only with a grant of almost unfettered discretion to the Commission, a discretion designed to avoid the litigation engendered by the pre-amendment disclosure provisions. To achieve this purpose, Congress provided that the Commission be constrained only by the statutory prerequisites that the requesting attorney general agree to keep the materials confidential and to use them only for official law enforcement purposes.[14] Congress' choice of "may" obviously indicates a margin of discretion inuring to the benefit of the FTC rather than the submitting party.[15] It would have been incongruous for Congress to *imply* a balancing test when doing so would have frustrated the primary purpose of these amendments by providing a new genesis for the litigation and delay that these amendments were meant to eliminate. **[317]**

Appellants urged at oral argument that the Court somehow take into account the special sensitive nature of the materials at issue. It is of no consequence that the materials to be disclosed may be highly sensitive or confidential, as for the purposes of this case we assume they are.[16] The Commission is clearly under no duty to afford special consideration to such material, as the language of §§ 6(f) and 21(b)(6) serves no purpose other than to authorize disclosure of sensitive or confidential material merely upon the required certification.[17]

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[14] This is consistent with the overall scheme of the Act to encourage various state law enforcement activities intended to curb antitrust violations. As Representative Preyer explained:

> In section 3(a) and section 14 of the bill, amending Section 6(f) and adding a new section 21 to the FTC Act, we intended to confirm the Commission's policy of providing documents and information on a nonpublic basis to Federal law enforcement agencies and to State attorneys general for State law enforcement purposes. This sharing of information is in the best spirit of Federal-State cooperation. It enhances the States' ability to remedy, *in a manner chosen by the State*, economic activities that have adversely affected their citizens. It saves taxpayers' money by minimizing duplication of efforts and by reducing the time and effort necessary to conduct State investigations.

126 Cong.Rec. H3870 (daily ed. May 20, 1980) (emphasis added).

[15] In effect, Congress statutorily authorized the Commission's implementation of policy rather than mandating disclosure. The use of "may" accordingly means no more than that the Commission need not automatically accede to each and every valid request for access to the Commission's files. As long as the Commission is not acting in an arbitrary or capricious manner, it may deem disclosure inappropriate or undesirable in certain cases as to whose nature we need not speculate. It is, in fact, Commission policy not to share documents with state officials automatically, but rather to evaluate requests on a case-by-case basis. *See* Findings of Fact and Conclusions of Law, Nov. 10, 1980, J.A. 289, 292.

[16] The record does not reveal the actual competitive sensitivity and confidential nature of the information sought to be released in this case. Inasmuch as appellants erroneously assumed that confidential materials are entitled to special consideration prior to disclosure under §§ 6(f) and 21(b)(6), the District Court assumed for the purpose of summary judgment the confidentiality of the material. *See* n.1 *supra*.

CONCLUSION

[3] We hold that the District Court correctly construed the legislation at issue as meant to promote the flow of information from federal to state law enforcement officials and to eliminate the judicial delays that compromised the Commission's cooperative efforts. In limiting the scope of judicial review to whether the Commission has complied with the statutory prerequisites of §§ 6(f) and 21(b)(6), we acknowledge the discretionary authority vested in the Commission by Congress through these statutes. We conclude that the Commission's disclosure was entirely within its discretion as long as the statutory prerequisites were met.[18]

Congress wanted the Improvements Act to cut down on judicial review and delay. That policy is well within congressional power, and the courts have an obligation to give such a policy ungrudging effect. We affirm the District Court's grant of summary judgment in favor of the Federal Trade Commission.

Affirmed.

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[17] If these sections were not specifically promulgated to expedite the nonpublic disclosure of confidential information they would be superfluous. There would be no need for even the standards established in these sections inasmuch as nonsensitive material would be in the public domain under the auspices of disclosure provisions such as the Freedom of Information Act.

[18] We need not consider whether the Commission must evaluate the state attorney general's specific intended use of the material or instead may rely on the attorney general's certification that the materials will be used only for official law enforcement purposes. In the instant case, the Commission was fully cognizant of the states' intended use of the materials and correctly determined such use to be authorized. For example, the state of Maryland filed its civil treble damage suit in federal court on June 19, 1980, and the FTC did not decide to grant discretionary release of the materials to Maryland until July 11, 1980. *See* J.A. 68. Additionally, during the disclosure process prior to the bringing of this action, the General Counsel's Office specifically rejected appellants' argument that the states were not seeking the documents for official law enforcement purposes. *See* Findings of Fact and Conclusions of Law, Nov. 10, 1980, J.A. 289, 294.

FEDERAL TRADE COMMISSION
v.
SOUTHWEST SUNSITES, INC., et al.*

No. 80-1793 FTC Docket No. 762 3027

United States Court of Appeals, Fifth Circuit
January 14, 1982

1. **Any conclusion of law based on an erroneous legal premise is reviewable, including a district court denial of a preliminary injunction which is generally left undisturbed, absent an abuse of discretion.**

While grant or denial of preliminary injunction is generally left to the discretion of the district court and will not be disturbed absent an abuse of that discretion, denial based on an erroneous legal premise is reviewable as is any conclusion of law.

2. **Section of FTCA authorizing agency to petition district courts for preliminary injunctions grants to courts jurisdiction to exercise all traditional equitable powers available to them when rendering such relief, even though the plain language in the provision speaks only of enjoining an unlawful act or practice.**

Though plain language of statute authorizing the Federal Trade Commission to petition district court for preliminary injunctive relief speaks only of enjoining an allegedly unlawful act or practice, such a grant of jurisdiction carries with it the authorization for the district court to exercise a full range of equitable remedies traditionally available to it.

3. **District court may order temporary ancillary relief barring dissipation of assets or funds that may be part of ultimate relief ordered in the case, in exercising its inherent equitable jurisdiction under the FTCA.**

In exercise of its inherent equitable jurisdiction pursuant to section of the Federal Trade Commission Act authorizing the Commission to petition district court for preliminary injunctive relief, district court may order temporary ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case.

4. **Even though preliminary injunction under the FTCA would be of limited duration, district court, in granting such relief, could appropriately consider that final relief ordered in subsequent civil action might entail consumer redress.**

In considering grant of preliminary injunction on petition of the Federal Trade Commission, in connection with sales of lots from tract of undeveloped land, court could appropriately consider that final, complete relief in the case might entail consumer redress in subsequent civil action, even though preliminary injunction under the Act would be of limited duration.

5. **To preserve the status quo pendente lite and assure the possibility of complete relief in subsequent adjudication, district court has jurisdiction, under FTCA to order ancillary relief in the form of an escrow of corporate assets.**

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*Reported in 665 F.2d 711 (1982). *Cert. denied*, 456 U.S. 973 (1982).

In connection with investigation of corporation selling undeveloped land, ancillary relief sought in the form of an escrow of corporate assets was within the jurisdiction of the district court under section of the Federal Trade Commission Act authorizing preliminary injunction, in order to preserve the status quo pendente lite and assure the possibility of complete relief following administrative adjudication.

6. **That district court lacks control over FTC administrative hearings does not preclude invocation of its inherent equitable jurisdiction to fashion preliminary injunction under FTCA which minimize injury to legitimate business activities, or condition the issuance of such relief upon the adoption of an expedited hearing schedule.**

Fact that the Federal Trade Commission conducts its own administrative hearing rather than bringing enforcement ac[713]tion directly in federal district court did not preclude application of doctrine of inherent equitable jurisdiction in determining scope of preliminary injunctive relief which could be granted under the Federal Trade Commission Act, but it remained within the discretion of the district court to tailor any preliminary injunction to minimize harm to company's legitimate business activities or to condition granting of injunction on adoption of an expedited hearing schedule.

7. **Appropriate standard, in considering preliminary injunction under the FTCA, was not whether there was a "strong showing" for requested relief, but whether it was "reasonably necessary" to preserve the possibility of complete and meaningful ultimate relief; and where FTC had indicated it would seek consumer redress through civil actions, court should also consider likelihood of agency's success on questions of whether a "reasonable man" would have known that challenged acts and practices were deceptive and fraudulent, under the circumstances.**

In considering preliminary injunction under the Federal Trade Commission Act, the appropriate standards was whether the requested relief was "reasonably necessary" in order to preserve the possibility of complete and meaningful relief at conclusion of the litigation, and not whether there was a "strong showing" for the particular relief requested, and in view of the Commission's indications that any consumer redress sought would be through subsequent civil action and not other mechanisms, district court should additionally inquire as to likelihood of Commission's success on the question of whether the acts and practices under scrutiny were ones that a reasonable man would have known under the circumstances were dishonest and fraudulent.

8. **Court had discretion, under FTCA, to require compulsory notification to purchasers of ongoing proceedings.**

Under section of the Federal Trade Commission Act authorizing the Commission to seek preliminary injunctive relief, district court, in case involving investigation of sale of undeveloped land, could in its discretion require compulsory notification to purchasers of ongoing proceedings.

9. **Where findings suggested that defendants' business operations were still in place and sales on-site were continuing, district court acted within its discretion in ordering defendants to cease and desist from further FTCA violations even though no promotional or sales compaign was presently being carried on.**

In connection with Federal Trade Commission investigation of sales of undeveloped land, the district court acted within its discretion, in preliminary injunction, in ordering defendants to cease and desist from further violations, even though no promotional or sales campaign was presently being carried on, where sales on-site were continuing and findings suggested that defendants' business operations were still in place.

10. **There was nothing impermissibly vague about use of terms "misrepresentation" and "failure to disclose material facts" in context of court's order.**

Within preliminary injunction issued under the Federal Trade Commission Act, there was nothing impermissibly vague about use of terms "misrepresentation" and "failure to disclose material facts."

11. **Instead of merely adopting by reference magistrate's findings dealing with acts and practices considered by both the magistrate and district court to be material misrepresentations and omissions, district court, in issuing its preliminary injunction should explicate those references.**

In issuing preliminary injunction under the Federal Trade Commission Act, district court should explicate its references to magistrate's orders rather than merely adopting by reference magistrate's findings dealing with specific acts and practices that the magistrate and the district court considered to be material misrepresentations and omissions within the scope of injunction.

Appeal and cross appeal were taken from preliminary injunction issued by the United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., under the Federal Trade Commission Act. The Court of Appeals, Ingraham, Circuit Judge, held that: (1) though plain language of statute authorizing the Federal Trade Commission to petition district court for preliminary injunctive relief speaks only of enjoining an allegedly unlawful act or practice, such a grant of jurisdiction carries with it the authorization for the district court to exercise a full range of equitable remedies traditionally available to it; (2) in the exercise of this inherent equitable jurisdiction, the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered; (3) district court could also consider that final, complete relief in the case might entail consumer redress through subsequent civil action; (4) district court could in its discretion require compulsory notification to purchasers of ongoing proceedings; (5) appropriate standard for granting relief was whether requested relief was "reasonably necessary" to preserve the possibility of complete and meaningful relief at conclusion of the litigation; (6) district court acted within its discretion in ordering defendants to cease and desist from further violations though there was no promotional or sales campaign presently being carried on; and (7) district court should explicate its references to the magistrate's order rather than merely adopting findings by reference.

Affirmed in part; reversed and remanded in part.

(Syllabus, with substituted captions, taken from 665 F.2d 711)

Charles D. Nelson, W. Dennis Cross, F.T.C., Washington, D.C., for plaintiff-appellant cross-appellee.

Stein, Mitchell & Mezines, Glenn A. Mitchell, Washington, D.C., for all defendants-appellees cross-appellants except Porters.

Alston, Miller & Gaines, John H. Brebbia, Washington, D.C., for Porter Realty, Inc. and Irvin Porter.

Before Ingraham, and Tate, *Circuit Judges.** [714]

Ingraham, *Circuit Judge*:

This case presents novel questions concerning the scope of the Federal Trade Commission's statutory authorization to seek preliminary injunctive relief from the district courts. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1976).[1] Pursuant to Section 13(b), the Commission asked the court below for an order escrowing certain assets of the appellees and other defendants, all of whom were targets of an investigation into land sales in Southwest Texas, and other relief including compulsory notification to consumers who had purchased land from appellees and were continuing to make payments under their contracts. After referral to a magistrate for an evidentiary hearing, the district court preliminarily enjoined appellees from future misrepresentations and omissions in connection with these sales of land in question, but declined to order the ancillary relief requested by the Commission in the belief that Section 13(b) did not authorize such relief. We affirm the order enjoining further violations of the Federal Trade Commission Act, but reverse on the issue of ancillary relief and remand for further consideration of the appropriateness of the Commission's request.

I. *Factual Background*

The Commission initiated its investigation of appellee Southwest Sunsites, Inc. in late 1973, shortly after the corporation began selling undeveloped land in Culberson and Jeff Davis Counties, located in Southwest Texas. This investigation later expanded to include appellees

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*Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

[1] Section 13(b) provides as follows:

Temporary restraining orders; preliminary injunctions

(b) Whenever the Commission has reason to believe—

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
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> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Although the lower court in *Federal Trade Commission v. British Oxygen Co.*, 529 F.2d 196 (3d Cir. 1976), ordered relief under 13(b) similar to that sought by the Commission here, the Third Circuit vacated the order and stated that it was unnecessary to reach the question of the proper scope of Section 13(b) relief, 529 F.2d at 199. Accordingly, the scope of Section 13(b) preliminary relief appears to be a question of first impression in this circuit and elsewhere.

Green Valley Acres, Inc., and Green Valley Acres, Inc., II. All these companies are Texas corporations, operated by two principal individuals, Sidney Gross and Edwin Kritzler.[2] Defendant Porter Realty, a real estate broker which sold approximately sixty per cent of the land in question, was not made subject to the preliminary injunction and is therefore not before us on this appeal.

The findings of the magistrate, as adopted by the district court, show that Culberson and Jeff Davis Counties are sparsely populated, and the climate is generally described as semi-arid to arid. The approximate rainfall is eight to nine inches per year. Appellees acquired large tracts of essentially barren land in this area, subdi[715]vided the land and offered it for sale in parcels of between five and forty acres, for approximately $600 to $700 per acre. Among other representations, appellees' main sales claims were that the property had good potential for homesites, farming, ranching and for commercial purposes, that water and utilities were readily accessible to the property, and that the area surrounding the properties was growing and developing.

Contrary to these representations, it appears that portions of the properties are not located above available ground water, and that where ground water is available it is between 325 to 800 feet below the surface. A well to provide water for a family of four on a five acre tract would cost in excess of $6000. Similarly, most of the property is not near electric or telephone utility lines and installation of such services is estimated at up to $2500. In short, the land sold by appellees has no economically feasible commercial application in the relatively small parcels made available, and parcels of this size have no resale value.

The vast majority of purchasers entered into purchase contracts without viewing the property. A majority of the purchasers were not residents of the State of Texas, and had been solicited through extensive nationwide advertising and sales efforts. Under the purchase contracts purchasers were permitted to pay principal plus interest over periods of time up to one hundred and twenty months. Title to the property would not transfer to the purchaser until the full price was paid, and failure to make a payment would subject a purchaser to cancellation of the contract and forfeiture of all monies already paid. According to appellees' records the total balance of outstanding accounts receivable on purchase contracts as of June 1979 was approximately $10,000,000.

The magistrate and district court concluded that there was substantial evidence appellees had misrepresented the value of the land, and omitted and failed to advise purchasers of facts such as the expenditures required for water and utilities, the unfeasibility of farming and ranching on the small tracts made available, and the fact that photographs used in Southwest

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[2] The Commission's complaint as to individual defendants was dismissed for lack of personal jurisdiction. This ruling was not appealed.

Sunsites' sales materials were not representative of the land as a whole. On the basis of these and other findings the district court concluded that the Commission had sufficiently established the probability that the defendants had engaged in acts and practices in violation of Section 5 of the Federal Trade Commission Act,[3] that the Commission dem**[716]**onstrated a likelihood of success on the merits in an administrative proceeding against defendants, and that it would be in the public interest to maintain the status quo during pendency of the administrative proceeding under Section 5.

Accordingly, the district court ordered the appellees to cease and desist from making misrepresentations and failing to disclose material facts concerning the investment potential and suitability of appellees' land for homesites or commercial purposes. The court declined, however, to order ancillary relief as requested by the Commission. Pointing to the transfer of funds from the corporate defendants to the various individuals controlling these corporations, the Commission had sought an escrow of present and incoming assets to preserve the possibility of an action for consumer redress under Section 19 of the Federal Trade Commission Act.[4] Both the magistrate and the district court concluded that such a "freeze" order was not authorized by Section 13(b). The magistrate did recommend that the appellees be required to notify purchasers of the ongoing proceedings before collecting any further payments; however, this relief was also denied by the district court.

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[3] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), provides in part as follows:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

[4] Section 19 of the Federal Trade Commission Act provides as follows:

(a)(1) If any person, partnership, or corporation violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) of this section in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a) of this title) with respect to which the Commission has issued a final cease and desist order which is

(footnote continued)

II. *Discussion*

The Commission raises the following issues on appeal: whether the district court erred in concluding that Section 13(b) of the Federal Trade Commission Act did not permit the court to order ancillary relief in the form of an escrow of corporate assets, and compulsory notification of affected consumers; and whether the requested injunctive [717]relief should have been granted in light of the district court's findings that the defendants had engaged in unfair and deceptive acts and practices. On cross-appeal, appellees attack the injunction as issued, contending that there was no evidence of continuing or future violations of the Federal Trade Commission Act that would justify an injunction and that the injunction order improperly requires reference to the magistrate's recommendations in order to ascertain the acts and practices enjoined.

A. *The Scope of Preliminary Relief under Section 13.*

In its complaint the Commission requested an injunction preventing future misrepresentations and omissions, and ordering the defendants to do the following: place and maintain in an escrow account, subject to the court's control, all payments to be received under land purchase contracts; make all tax, mortgage and other payments necessary to protect the purchasers' interests in the land; refrain from cancelling any contracts for a purchaser's failure to meet any obligations under the contract; and refrain from transferring, selling, assigning or in any way encumbering the land, sales contracts or other assets of the corporate defendants without specific approval of the district court. The complaint also sought to enjoin the brokers, Porter Realty and Irvin Porter, from receiving further commissions or residual commissions during the pendency of the action. In its brief

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(*footnote continued from previous page*)

applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

Nature of relief available

(b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violations or the unfair deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damage.

15 U.S.C.A. § 57b (Supp. 1981).

to this court the Commission explains that this relief is necessary in light of the significant threat of dissipation of corporate assets: the corporations are closely held and pay the individuals involved large loan repayments and a substantial percentage of incoming payments as fixed commissions or "overrides;" and both the corporations and the individuals face a number of other legal actions. Implicit in the Commission's requests is the future availability of an action for consumer redress, including refunds, under Section 19 of the Federal Trade Commission Act. With Section 19 in mind, the Commission argues, the requested relief is within a district court's inherent equitable jurisdiction to preserve the possibility of complete and effective relief at the conclusion of the process of adjudication on the merits. The magristrate and district court concluded that, from a plain reading of Section 13(b), the Commission may seek only that preliminary relief necessary to restrain alleged unfair practices, pending a Section 5 administrative proceeding. In this view, the scope of preliminary relief is limited to the relief which may be ordered by the Commission itself under Section 5. The ancillary relief sought here, the district court stated, could not be characterized as "merely enjoining the improper act or practice found likely to occur." Both the magistrate and district court considered the possibility of an eventual Section 19 consumer redress proceeding to be an attenuated and inadequate justification for preliminary relief.

[1] While the grant or denial of a preliminary injunction is generally left to the discretion of the district court and will not be disturbed absent an abuse of that discretion, *Foley v. Alabama State Bar,* 648 F.2d 355, 358 (5th Cir. 1981), denial based upon an erroneous legal premise is reviewable as is any conclusion of law. *Douglas v. Beneficial Finance Co. of Anchorage,* 469 F.2d 453, 454 (9th Cir. 1972). We believe the district court adopted an unduly narrow view of its powers and responsibilities under the Act and will remand for further consideration of the requested relief under the principles discussed here.

[2, 3] By authorizing the Federal Trade Commission to petition a district court for preliminary injunctive relief, Section 13(b) "posts a clear entrance sign for FTC provisional relief applications." *Federal Trade Commission v. Weyerhaeuser Co.,* 1981-2 Trade Cas. (CCH) ¶ 64,263 at 74,123, 665 F.2d 1072 (D.C.Cir. Sept. 1, 1981). Although the plain language of the statute speaks only of enjoining an allegedly unlawful act or practice, virtually identical statutes permitting other agencies to seek preliminary injunctions have been interpreted as invoking the full equitable juris**[718]**diction of the district court. *Mitchell v. DeMario Jewelry, Inc.,* 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) (Section 17 of the Fair Labor Standards Act; jurisdiction granted "to restrain violations" of the Act); *Porter v. Warner Holding Co.,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (Section 205(a) of Emergency Price Control Act of 1942; application for order enjoining violations of the Act); *Interstate Commerce*

Commission v. B & T Transportation Co., 613 F.2d 1182 (1st Cir. 1980) (Section 322(b)(1) of Motor Carrier Act; jurisdiction to restrain "further violation"). *See also Securities and Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981); *United States v. Coca Cola Bottling Co. of Los Angeles,* 575 F.2d 222 (9th Cir.), *cert. denied* 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978); *Commodity Futures Trading Comm'n v. Muller,* 570 F.2d 1296 (5th Cir. 1978). These cases make indisputably clear that a grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it. The doctrine is summarized in the following often quoted discussion in *Porter*:

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. *Virginian R. Co. v. System Federation,* 300 U.S. 515, 552 [57 S.Ct. 592, 601, 81 L.Ed. 789]. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles,* 321 U.S. 321, 329 [64 S.Ct. 587, 591, 88 L.Ed. 754]. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest, if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. *Camp v. Boyd,* 229 U.S. 530, 551-552 [33 S.Ct. 785, 793, 57 L.Ed. 1317].
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> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

328 U.S. at 397-98, 66 S.Ct. at 1088-1089. The Supreme Court's reaffirmation of this principle in *DeMario* contained this further explanation:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.' *Clark v. Smith,* 13 Pet. 195, 203 [10 L.Ed. 123].

361 U.S. at 291-92, 80 S.Ct. at 334-335. In the exercise of this inherent equitable jurisdiction the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case. *Securities and Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981) (appointment of receiver); *Commodity Futures Trading Commission v. Muller,* 570

F.2d 1296 (5th Cir. 1978) ("freeze" of defendant's assets); *Securities* [719] *and Exchange Commission v. Manor Nursing Center,* 458 F.2d 1082 (2d Cir. 1972) (freeze of assets pending transfer to trustee). As this court found in *Muller,* such an order may be required "to preserve the status quo so that an ultimate decision for the Commission may be effective." 570 F.2d at 1300 (citations omitted).

The holdings of these cases are directly applicable to this case. Section 13(b) contains no express limitations on the otherwise full powers of the district court to mold appropriate decrees under its traditional equitable jurisdiction, and we decline to tie the hands of the district court without such express limitation. A similar conclusion was recently reached by the D.C. Circuit in its holding that Section 13(b) authorized the district court to order an acquiring company to hold separate a portion of the assets acquired through a merger. *Federal Trade Commission v. Weyerhaeuser Co.,* 665 F.2d 1072 (D.C.Cir. 1981). The D.C. Circuit reviewed the legislative history and purposes of Section 13(b) and concluded that Congress intended this section to be used flexibly and with reference to "the historic injunctive process," citing *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 591, 88 L.Ed. 752 (1944).

[4] We also believe that the exhortation in *DeMario* to preserve the possibility of complete relief, which merely restates the purpose of preliminary injunctions in general, *see Developments, in the Law—Injunctions,* 78 Harv.L.Rev. 994, 1096 (1965), makes it appropriate to consider that the final, complete relief in this case may entail consumer redress through a Section 19 proceeding. Simply because the complete resolution of a matter will require a two-step process does not relieve a court of the task of determining how to preserve a state of affairs such that a meaningful decision can be rendered after full consideration of the merits. Indeed, although it may seem unusual at first to seek preliminary relief with reference to a separate action, it has long been considered within a court's equitable jurisdiction to issue an injunction preserving property pending a subsequent determination in another forum of the rights of parties in the property. *See Arrow Transportation Co. v. Southern Railway Co.,* 372 U.S. 658, 679, 83 S.Ct. 984, 995, 10 L.Ed.2d 52 (1963) (Clark, J., dissenting); *Erhardt v. Boaro,* 113 U.S. 537, 5 S.Ct. 565, 28 L.Ed. 1116 (1885).

We observe also that several commentators have characterized a consumer redress action as a continuous two-phase process, the first phase being administrative adjudication, and the second judicial determination of appropriate redress. II. S. Kanwit, Federal Trade Commission § 21.05 (1980); Kintner & Westermeier, *Obtaining Refunds for Consumers Under Section 19 of the FTC Act,* 29 Syracuse L.Rev. 1025, 1034-36 (1978). Such a characterization, which strikes us as a reasonable one, makes even more apparent the propriety of framing preliminary relief with the entire process in mind.

These conclusions are entirely consistent with the legislative history of both Sections 13(b) and 19. Section 13(b) was introduced by Senator Jackson as a floor amendment to S. 1081, the Federal Lands Right-of-Way Act, and became Section 408(f) of the Trans-Alaska Pipeline Authorization Act, Pub.L. No. 93-153, 15 U.S.C. § 53(b) (1976). Senator Jackson stated that the proposed new Commission authority, of which Section 13(b) was one of several provisions, was "designed to enable the Commission to carry out its mandate to protect the public interest through a prompt and aggressive enforcement of the laws it administrates." 119 Cong.Rec. 22979 (July 10, 1973). *See also* Sections 408(a)(1), and (b), Pub.L. No. 93-153, 87 Stat. 591. Although the preliminary relief provisions were intended to apply to both deceptive practices and anti-competitive conduct cases, as indicated by the express application of Section 13(b) to "any provision of law enforced by the FTC," most of the discussion in the House concerned the need for preliminary relief in anti-competitive-merger cases. Nevertheless this discussion is revealing; Representative Smith noted that substantial public injury can take place during the pendency **[720]** of a Commission proceeding, and that "without injunctive powers the Federal Trade Commission frequently is left with having to impose remedies that are conspicuously inadequate . . . . The Commission may rule the conduct illegal but during this operation the patient may die . . . . Without this injunction power consumers have no protection at all during the pendency of the suit . . . . It is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision." 119 Cong.Rec. 36608-9 (Nov. 12, 1973). The conference report did not specifically address the scope of 13(b) relief.

Approximately one year later, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub.L. No. 93-637, 88 Stat. 2183. Section 206, Consumer Redress, added the new Section 19 of the Federal Trade Commission Act. This legislation was explicitly intended to improve the Commission's consumer protection powers. See S.Conf.Rep. 93-1408, 93d Cong. 2d Sess. 1 (1974), [1974] U.S.Code Cong. & Admin.News, 7702, 7755. Significantly, Representative Eckhardt, quoting an administration spokesman, urged that consumer fraud be rendered "pursuable, punishable, and profitless." 120 Cong.Rec. 31735 (Sept. 19, 1974). The evident intent of these 1975 amendments was to add significant new weapons to the Commission's enforcement arsenal in order to make more meaningful and complete consumer relief possible. It seems to us that not only is the use of preliminary relief a desirable and effective method of implementing consumer redress under Section 19, but that precluding such preliminary relief could entirely prevent the effectuation of Section 19 in circumstances such as those alleged by the Commission in this case.

[5] We believe that through these various recent amendments to the Federal Trade Commission Act, "Congress was evolving a statutory plan for the protection of the . . . public." *Securities and Exchange Commission v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963). The Act clearly makes the district court a vital "enforcement arm" of the statute. *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19-20, 94 S.Ct. 1028, 1038, 39 L.Ed.2d 123 (1974). The type of ancillary relief sought by the Commission in this case appears to be well within the jurisdiction of the district court under Section 13(b), in order to preserve the status quo pendente lite and assure the possibility of complete relief following administrative adjudication.

[6] Appellees raise two principal objections to the application of the inherent equitable jurisdiction doctrine to this case.[5] First, appellees argue that all the cases involving agencies other than the Federal Trade Commission are inapplicable because those other agencies all bring their enforcement actions directly in federal district court, where the court has continuing su**[721]**pervision over the litigation. In contrast, the Commission does not rely on the district courts for this purpose but rather conducts its own administrative hearings, over which the district court that issues preliminary relief has no control. We reject this attempted distinction. As the Commission points out, appellees' argument would prevent the issuance of any preliminary injunction sought by the Commission, despite Section 13(b), on the ground that the administrative proceedings were likely to be protracted. As we observed at the outset of this discussion, the relevant statutory language in Section 13(b) is virtually identical to the language of other legislation that has been found to invoke the district court's general equitable jurisdiction. Appellees' arguments in this context do not suggest the "clear and valid legislative command, . . . or necessary and inescapable inference" required by *Porter* to negate the comprehensiveness of the Court's equitable jurisdiction. 328 U.S. at 398, 66 S.Ct. at 1089. We also note that lack of continuing supervisory control over the administrative proceeding did not concern the Supreme Court when it authorized the Commission to seek preliminary relief under the All Writs Act, 28 U.S.C. § 1651(a) (1976), to enjoin a merger pending administrative proceedings. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 604, 86 S.Ct. 1738, 1742,

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[5] Two of appellees' arguments may be summarily disposed of. In support of its argument that Section 13(b) is not intended to grant the type of preliminary relief requested by the Commission in this case, appellees point to the failure of subsequent bills introduced in Congress to specifically grant the Commission the power in dispute in this case. As the Commission points out, however, it is not improper for an agency to seek explicit authorization for powers thought to be somewhat controversial, and any number of reasons for the failure of this subsequent legislation are possible. Courts typically refrain from drawing conclusions from subsequent legislative history for precisely these reasons. *See Federal Trade Commission v. Dean Food Co.*, 384 U.S. 597, 609, 86 S.Ct. 1738, 1745, 16 L.Ed.2d 802 (1961) *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1962).

At oral argument, counsel for appellees also suggested that a due process violation would result if the Commission determined, prior to the Section 5 administrative hearing that it would also seek consumer redress under Section 19. *But cf. Withrow v. Larkin*, 421 U.S. 35, 46-59, 95 S.Ct. 1456, 1463-1470, 43 L.Ed.2d 712 (1975). This contention was not addressed in the briefs, however, and now comes too late. *See Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980).

16 L.Ed.2d 802 (1966). While we have no indication here that the Commission's administrative proceedings will be unduly protracted, if such facts do arise, it remains within the discretion of the district court to tailor any preliminary injunction to minimize the harm to appellees' legitimate business activities, or to condition the granting of the injunction on adoption of an expedited hearing schedule. *See Federal Trade Commission v. British Oxygen,* (CCH) 1974 Trade Cas. ¶ 75,003 (D.Del. 1974), *vacated, Federal Trade Commission v. British Oxygen,* 529 F.2d 196 (3d Cir. 1976).

Appellees' second argument is that any order of preliminary relief under Section 13(b), by the terms of the statute, has limited duration and only lasts "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final . . . ." 15 U.S.C. § 53(b)(2) (1976). As order of the Commission becomes final upon the exhaustion of available review procedures, or expiration of time to seek such review. 15 U.S.C. § 45(g) (1976). Because of this limited duration, appellees argue, the preliminary injunctive relief section could not have been intended to be used in conjunction with Section 19, which comes into play only after a final cease and desist order. 15 U.S.C. § 57b(a)(2) (1976). While we agree with appellees' reading of the limited duration of a Section 13(b) preliminary order, this presumably signifies only that once the Commission has issued a cease and desist order it must then apply to whatever district court will consider a Section 19 proceeding for further relief. The limited question facing a district court in these circumstances is whether, in light of the showing of likelihood of success, injunctive relief to preserve the status quo *at this time* is in the public interest.

We conclude that the doctrine of inherent equitable jurisdiction is fully applicable where, as here, "Congress has utilized . . . the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest." *Porter,* 328 U.S. at 403, 66 S.Ct. at 1091.[6]

In its opinion the district court cited *Federal Trade Commission v. Turner,* 609 F.2d 743 (5th Cir. 1980), in the apparent belief that while the Commission acts in the public interest when proceeding under Section 13(b), this public interest role does not carry over to a Section 19 proceeding, which is brought to redress private injuries. *Turner,* however, concerned the power of the Commission itself to issue subpoenas in aid [722] of its Section 19 authority. Therefore we do not feel that case controls the question presented here, regarding the inherent equitable jurisdiction of the district court and the exercise of that jurisdiction under the statutory scheme of the Federal Trade Commission Act.

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[6] The parties also contest the admissibility of various items of evidence produced by the Commission. Any such challenges not yet waived can be considered on remand.

Because of our resolution of this issue we need not address the possible use of the All Writs Act, or the question of the Commission's own power to order consumer redress in a Section 5 cease and desist order.

B. *The Standard for Issuing Ancillary Relief.*

[7] In its discussion of the ancillary relief requested, the district court stated:

> Assuming, *arguendo*, that such an order is authorized under section 13, a court would be loathe to issue such an injunction in the absence of a strong showing of dissipation of assets. Under the evidence before me, I do not believe that this case warrants this drastic and unprecedented relief.

Appellees contend that this statement was a finding of fact that precludes availability of the requested injunctive relief unless shown to be clearly erroneous. Whether or not this statement is intended to be a finding of fact, it is clear that the district court was applying a standard requiring a "strong showing" of the need for the particular relief requested. This standard appears to be excessively harsh, and on remand the district court should reexamine the evidence and determine whether the requested relief is "reasonably necessary" in order to preserve the possibilty of complete and meaningful relief at the conclusion of litigation. *See Commodity Futures Trading Commission v. Muller,* 570 F.2d at 1296, 1301 (5th Cir. 1978); cf. *United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 231 (9th Cir.), *cert. denied,* 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978) ("reasonable probability" that merger would be anticompetitive). In view of the Commission's indications that any consumer redress sought in this case would be through Section 19 and not other mechanisms, the district court should additionally inquire as to the likelihood of the Commission's success on the question whether the acts and practices under scrutiny are ones that "a reasonable man would have known under the circumstances [were] dishonest or fraudulent." Section 19(a)(2), 15 U.S.C.A.§ 57b(a)(2) (Supp. 1981).

C. *Compulsory Notification.*

[8] Although the Commission's complaint did not specifically mention compulsory notification to purchasers of the ongoing proceedings, the complaint did allege that the defendants were continuing to misrepresent and failing to disclose material facts to purchasers and sought an order compelling defendants to cease and desist such acts. The magistrate recommended that the defendants be enjoined from receiving and depositing further payments pursuant to purchase contracts until the purchasers are advised of the possibility of such misrepresentations and omissions. The district court

rejected this recommendation, stating "A notification order suffers from the same defects as does creation of escrow accounts; each is solely referable to past alleged violations."

Once again we believe the district court took an unduly narrow view of its available jurisdiction under Section 13(b). In a suit for permanent injunction under Section 13(b), the court in *Federal Trade Commission v. Virginia Homes Mfg. Corp.*, 509 F.Supp. 51, 55 (D.Md. 1981), *aff'd, Federal Trade Commission v. Virginia Homes Mfg. Corp.*, No. 81-1187 (4th Cir., July 14, 1981) (unpublished), held that "compulsory notice is implicitly authorized by section 13(b) so long as such notice would be essential to the effective discharge of the court's responsibilities." *See also Federal Trade Comm. v. Travel King, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,419 (W.D. Wash. 1974). Because of our holding above that Section 13(b) invokes the inherent equitable jurisdiction of the district courts, we remand to allow the district court to reconsider whether notification to consumers is called for in this case. As in *Virginia Homes,* it is conceivable that consumers could be prevented from properly **[723]** asserting their possible legal rights absent notification of possible misrepresentations. We note that the case for notification was much more compelling in *Virginia Homes,* however; there, holders of warranties that were found to violate federal law in various respects would be unaware of their newer more expansive warranty rights absent the notification. 509 F.Supp. at 56. *See also FTC v. Travel King, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,419 (W.D. Wash. 1974) (notification regarding "psychic surgery" claims). Accordingly, in the exercise of its discretion the district court may conclude that the rights of purchasers would be adequately protected by other preliminary relief.

III. *The Cross-Appeal*

[9] Appellees argue that there was no showing of any continuing or future violations of the Act that would justify the district court's injunction prohibiting further misrepresentations and omissions in connection with the sale of land. Appellees point to the magistrate's finding that there is no promotional or sales campaign presently carried on by appellees. This same finding, however, states that sales on-site are continuing; the magistrate's findings generally suggest that the appellees' business operations are still in place.

The district court acted well within its discretion in ordering appellees to cease and desist from further violations of the Act. This is particularly true when the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a "fair inference of a reasonable expectation of continued violations" absent restraint. *Securities and Exchange Commission v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1100-01. (2d Cir. 1972).

Appellees' final attack on the injunction issued is that the terms of the injunction fail to comply with the requirement of specificity in Fed.R.Civ.P. 65 in two respects: the use of "catchall" phrases such as "misrepresentation" and "disclosure of material facts" is impermissibly vague; and the provisions of the court's order that adopt or refer to the magistrate's report violate Rule 65(d)'s prohibition of reference to other documents.

[10] In its order, the district court reviews the magistrate's report adopting particular findings and modifying others and concludes by ordering appellees to "cease and desist from making misrepresentations and failing to disclose material facts to purchasers and prospective purchasers concerning investment potential and suitability of land in [appellees' subdivisions] regarding usability as homesites, farms, ranches or for commercial purchases." We find nothing impermissibly vague about the use of the terms "misrepresentation" and "failure to disclose material facts" in the context of the district court's order, particularly because the order does expressly describe the difficulty in obtaining utility services for the property and the economic unfeasibility of the land for farming, ranching or commercial purposes in the small parcels made available. There seems to be little danger that appellees will misapprehend what misrepresentations and omissions are prescribed, or that appellees will be liable to contempt citations for activities not contemplated by this order.

[11] However, several of the magistrate's findings adopted by reference deal with specific acts and practices the magistrate and the district court consider to be material misrepresentations and omissions; for example, finding 23 regarding misrepresentation of the potential appreciation in value, and findings 24(b) and (c) concerning the failure to advise purchasers of the substantial sums of money required to make the land suitable for housing or farming. Incorporation of such findings by reference violates the prohibition in Rule 65(d) of "reference to the complaint or other document." This no-reference requirement has been strictly construed in this circuit. *See Meltzer v. Board of Public Instruction of Orange County, Florida,* 480 F.2d 552, 554 (5th Cir. 1973) (provision of order referring to court's prior order violates Rule 65(d)); *B.H. Bunn Co. v. A.A.A. Replacement Parts Co.,* 451 F.2d 1254, 1269 (5th Cir. 1971) **[724]** (reference back to findings of fact may be insufficient to advise parties of permissible and prohibitive conduct). Accordingly, on remand the district court should explicate its references to the magistrate's order. The Commission protests that correction of this defect calls for the purely mechanical exercise of typing in the specific parts of the magistrate's report where indicated. This may indeed seem overly technical, but it would allow the parties to interpret the injunction "from the four corners of the order" as required by Rule 65(d). *Sanders v. Airline Pilots Ass'n International,* 473 F.2d 244, 247 (2d Cir. 1972).

IV. *Conclusion*

In summary, we remand for the district court to revaluate its denial of the Commission's requested preliminary injunctive relief in light of our discussion of the availability of such measures under Section 13(b) of the Federal Trade Commission Act. We affirm the injunction issued by the district court insofar as it enjoins further violations of the Act, and direct that the district court amplify its references to the magistrate's report.

AFFIRMED in part; REVERSED and REMANDED in part.

[illegible]

[illegible]

[illegible]

[illegible]

AMERICAN NATIONAL STANDARDS INSTITUTE, INC., et al. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 79-1275 TRR No. 215-61

United States District Court, District of Columbia
February 4, 1982

In an action in which plaintiffs sought to bar FTC from reviewing the standards and certification rulemaking record to determine if the rule could be promulgated under section of the FTCA which authorized the Commission to regulate unfair methods of competition, court granted FTC's cross-motion for summary judgment and dismissed the suit for lack of jurisdiction. Court held that despite plaintiffs' claim that agency lacked authority to promulgate such a rule and that notice of the rulemaking was inadequate, proposed rule was neither a reviewable "final agency action," nor an interlocutory action justifying judicial intervention.

Daniel J. Piliero, II, Washington, D.C., for plaintiffs.
Patricia J. Kenney, Asst. U.S. Atty., Washington, D.C., for defendant.

Before Robinson, *District Judge:*

MEMORANDUM OPINION

This case challenges the validity of a pending Federal Trade Commission (FTC) rulemaking proceeding. The proposed rule establishes requirements for the development and use of product standards and certifications. The case was filed in May 1979 by fifteen trade associations engaged in development and use of product standards, to challenge the procedures under which the rulemaking was being conducted. On June 1, 1979 this Court dismissed the action for want of jurisdiction. After noting our limited jurisdiction to affect ongoing rulemaking proceedings, the Court held that Plaintiffs' complaint did not present any clear violations of substantial constitutional or statutory rights; therefore, review was unavailable. The Order was appealed. Prior to decision, Congress passed the Federal Trade Commission Improvements Act of 1980 (FTCIA), altering in some respects the authority of the FTC as established by the Federal Trade Commission Act (FTC Act).[1] In reliance on the new statute, Plaintiffs on June 18, 1980 petitioned the FTC to terminate the proposed rulemaking proceeding; the petition was denied.

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*Reported in Trade Reg. Rep. ¶ 64,517 at 72,877 (1982-1 Trade Cases).

[1] At issue is § 7 of the FTCIA, which amends § 18(a)(1)(B) of the FTC Act to provide that ". . . the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section." 15 U.S.C. § 57a(a)(1)(B).

On January 9, 1981 the Court of Appeals remanded the case for "reconsideration in light of" the FTCIA. This Court ordered the parties to submit cross-motions for summary judgment, addressing how the FTCIA affects the legal basis for dismissal enunciated in this Court's June 1, 1979 Order. Before the Court now are Defendant's Motion for Summary Judgment and a Motion by Plaintiff National Fire Protection Association for Summary Judgment.

The Commission concedes that, as a result of the FTCIA, it no longer has authority to promulgate a rule governing standards and certification as an unfair or deceptive act or practice under § 18 of the FTC Act, and admits that it no longer contemplates such a rule under that section. On February 4, 1981 the Commission published an amended notice[2] to that effect, indicating that if it adopted a rule, it would be solely under the authority granted it by § 6(g) of the FTC Act (15 U.S.C. § 46(g)) to regulate unfair methods of competition. 46 Fed. Reg. 10747 (February 4, 1981). The revised notice specifically indicated, however, that the Commission was reevaluating the rule, including the possibility of utilizing alternative enforcement methods. The Commission announced that the FTC staff would analyze the rulemaking record and issue a report and recommendation. The initial timetable for completion of the report was July 15, 1981; that has since been pushed back to "late fall 1981"[3] and FTC staff contemplates seeking additional time to publish the report.[4]

Plaintiffs claim the Commission's authority to promulgate the rule under § 6(g) did not survive the FTCIA. Alternatively, they suggest that the case law establishing the Commission's substantive rulemaking authority under § 6(g) should be reconsidered; and that, even if rulemaking authority exists under § 6(g), this particular rule exceeds that authority. Finally, Plaintiffs assert that the notice of the rulemaking was inadequate in that it failed to set forth the substance or basis of the proposed rule with requisite specificity. It is on these grounds that Plaintiffs seek to enjoin the Commission from further consideration of the proposed rule and the rulemaking record.

For the reasons set forth below, the Court concludes that nothing in the FTCIA alters our reasons for dismissing this case two and one-half years ago. The challenged agency action is neither a "final agency action" within the meaning of 5 U.S.C. § 704 nor an interlocutory action justifying judicial intervention. Accordingly, this Court lacks jurisdiction, and the case must be dismissed.

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[2] The original rulemaking notice was published on December 7, 1978, 43 Fed. Reg. 57269 (1978).

[3] 46 Fed. Reg. 39845 (August 5, 1981).

[4] Affidavit of Roger J. Schroeder, Exhibit B, Defendant's Motion for Summary Judgment.

1. *Final Agency Action*

This Court's review of the contested rulemaking proceedings is governed by the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *Association of National Advertisers, Inc. v. F.T.C.*, 565 F. 2d 237, 239 (2d Cir. 1977). Section 704 of that Act provides for review of "final agency action." The "finality" requirement has been interpreted in a pragmatic way. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In *Abbott*, for example, administrative regulations requiring labeling for prescription drugs were held to be final action since they were "definitive statements" of the Commission's position and had a direct and immediate effect on the daily business of the complaining parties. *Id.* at 151-152.

The same cannot be said of the rulemaking proceeding at issue here. No rule has been adopted and it is far from certain that one will be. As an indication only of the need for a "second look" at the entire proceeding—including the need for *any* rule—the Commission's continued review of the rulemaking record has no legal force comparable to that of the regulation in *Abbott*, nor any comparable practical effect on Plaintiffs' daily operations. See *F.T.C. v. Standard Oil Company of California*, 449 U.S. 232, 242 (1980).[5]

Plaintiffs' efforts to characterize the Commission's denial of the petition to terminate the proceedings as a final agency action are misguided. In *Standard Oil Company of California*, (hereinafter Socal), *supra*, the Commission issued a complaint against Socal averring that it had reason to believe the company was violating § 5 of the FTC Act. Socal's petition to dismiss the complaint was denied and Socal brought suit seeking judicial review. The Court concluded that issuance of the complaint was not "final agency action" and specifically rejected Socal's agrument that the Commission's refusal to withdraw the complaint rendered the complaint a final action. The Commission's denial of the petition did not render the complaint a "definitive" action nor "augment the complaint's legal force or practical effect upon Socal." *Id.* at 243. Like the issuance of the Socal complaint, the Commission's action here is not a "definitive statement of position. It represents a threshold determination that further inquiry is warranted. . ." *Id.* at 241.

Since the agency action at issue here lacks any "indicia of finality," *Association of National Advertisers*, 565 F.2d at 239, this Court has jurisdiction only if this case presents the kind of situation in which interlocutory review is appropriate. The Court concludes that it does not.

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[5] The economic harm allegedly befalling Plaintiffs as a result of the Commission's refusal to terminate the proceedings is different in kind from the economic burdens attending what has heretofore been considered final agency action. Moreover, Plaintiffs' vague, unsupported assertions of irreparable economic and professional injury are insufficient to justify interlocutory review of the agency action on the grounds of "hardship."

II. *Availability of Interlocutory Review*

Interlocutory review of agency action is very much the exception rather than the rule. *Association of National Advertisers, Inc. v. F.T.C.*, 617 F.2d 611, 622 (D.C. Cir. 1979). Generally a party may not bypass established avenues for review within the agency unless the issues cannot be raised from a later order of the agency; the agency has very clearly violated an important constitutional or statutory right; or the question involved is a strictly legal one and judicial review of the issue would not be aided by application of the agency's expertise or by additional administrative decision. *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 710-711 (D.C.Cir. 1971).

There is no question that the issues raised in this action—the Commission's jurisdiction and adequacy of notice—may be raised on appeal if and when a rule is promulgated. There is no basis on which to conclude that meaningful review in the context of a final agency rule would be unavailable.

There is similarly no basis on which to conclude that the agency has clearly violated Plaintiffs' constitutional or statutory rights, despite Plaintiffs' claims that the FTC has violated the notice requirement of 5 U.S.C. § 553 and is without jurisdiction to pursue the standards and certification rulemaking.

A. *Violation of Notice Requirements*

Section 553(b)(3) requires a rulemaking notice to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Plaintiffs' complaint seems to be that, because the Commission originally proceeded under both §§ 18 and 6(g), created the rulemaking record on that "dual authority" and then in response to the withdrawal of its § 18 authority amended the notice to provide that it was proceeding only under § 6(g), Plaintiffs were somehow inadequately apprised of the substance or basis of the rule.

In addition to being premature, see *Association of National Advertisers*, 617 F.2d at 621, Plaintiffs' claim is faulty on the merits. Since it was clear that the rulemaking was initially conducted pursuant to both statutes, the Court is at a loss to understand how the Commission's later decision to proceed under only one statute could possibly render the notice defective.

The adequacy of notice of a proposed regulation is tested by determining whether the notice would fairly apprise interested persons of the subjects and issues before the agency and thereby ensure effective participation in the rulemaking process. *Ethyl Corporation v. E.P.A.*, 541 F.2d 1, 48 (D.C.Cir.), cert. denied, 96 S.Ct. 2662-2663 (1976). The original rulemaking notice was over fifteen pages long; it described in considerable detail the proposed rule, the reasons therefor, and the types of practices the rule was intended to curb. It is preposterous for Plaintiffs to now claim that they lacked sufficient understanding of the proceeding to meaningfully participate.

Plaintiffs further claim that they were inadequately informed of the basis of the rule. Section 553(b)(2) requires rulemaking notices to include "reference to the legal authority under which the rule is proposed." That requirement has been met. The December 7, 1978, notice indicates more than once that it is defining unfair methods of competition *and* unfair or deceptive acts or practices. Indeed, Plaintiffs' Motion for Summary Judgment concedes that both the rulemaking notice and the staff report of December 7, 1978, cite the two statutes relied upon.[6] Even when the Commission shifted to sole reliance upon § 6(g), the basis of the rule remained clear. It is simply inconceivable that Plaintiffs were confused or in any way left in the dark on the subject matter or basis of the proposed rule.

Plaintiffs' claim that the notice failed to define with specificity the unfair or deceptive acts the rule is intended to prevent is equally frivolous. The case Plaintiffs rely on—*Katharine Gibbs School (Incorporated) v. F.T.C.*, 612 F.2d 658 (2d Cir. 1979)—noted that the specific definition of unfair acts or practices was necessitated by the statutory language of 15 U.S.C. § 57a(a)(1)(B); Section 6(g)[7] contains no such requirement. Even if such a requirement could be engrafted onto § 6(g) procedure, the requirement has been met. At page 57280 of the original rulemaking notice, under a section entitled "Statement of the Commission's Reasons," the Commission recites the types of practices reviewed during the staff investigation that preceded the rulemaking which were "associated with complaints of various injuries to consumers and competition." 43 Fed. Reg. 57269, 57280 (December 7, 1978). The Commission has done far more than simply treat "violations of its 'requirements prescribed for the purpose of preventing' unfair practices as themselves the unfair practice." *Katharine Gibbs* at 662.

B. *The Commission's Jurisdiction*

Plaintiffs assert that the Commission is "utterly without authority based on either case precedent or the text of § 6(g)" to issue this rule. Far from establishing a "clear violation" of the FTC's authority, Plaintiffs' arguments are without merit and do not justify review of the agency action at this juncture.

First, Plaintiffs contend that the FTCIA withdrew not only the Commission's authority to issue a rule concerning standards and certification under § 18 but also under § 6(g). Both the text and legislative history of the FTCIA belie Plaintiffs' claims.

Section 7 of the FTCIA amended 15 U.S.C. § 57a(a)(1)(B) to read as follows:

> The Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section.

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[6] Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 3.

[7] 15 U.S.C. § 46(g).

Section 57(a)(1)(B) is included in a section entitled "Permissible rules; rules relating to unfair or deceptive acts or practices" and *by its terms* applies only to that section. Moreover, the Conference Report on the bill[8] indicates in no uncertain terms that the Act leaves "unaffected whatever authority the Commission might have under any other provisions of the FTC Act to issue rules with respect to 'unfair methods of competition' relating to standards and certification activities."[9] Although the Conference Committee formally took no position on whether such authority in fact existed, it is beyond peradventure that such other authority as did exist was to remain untrammeled.

Plaintiffs also argue that the Conference Committee's directive that the Commission reconsidered alternative methods of dealing with standards and certification indicates a clear Congressional mandate that this particular proceeding halt and that the proceeding is therefore ultra vires.[10] It should scarcely need mention that a suggestion by a conference committee does not a "Congressional mandate" make; and by no stretch of the imagination can it be interpreted as depriving the Commission of its authority to conduct the rulemaking proceeding here at issue. Moreover, it is noteworthy that the adopted conference bill replaced a provision in the Senate Bill which *would* have required the Commission to terminate the proceeding and abandon the record already created.[11]

Second, Plaintiffs claim that § 6(g) confers no substantive rulemaking authority on the FTC. Plaintiffs acknowledge the difficulty of their position in light of *National Petroleum Refiners Association v. F.T.C.*, 482 F.2d 672 (D.C.Cir. 1973), cert. denied, 415 U.S. 951 (1974), which held that § 6(g) *does* confer such authority upon the FTC. Plaintiffs suggest, therefore, that in light of "emerging Congressional and public disenchantment with expansive federal agency regulations" this Court reconsider the holding of *National Petroleum*. Plaintiffs assert that "The legislative history of the Improvements Act is replete with statements that the issue of whether § 6(g) confers any substantive rulemaking authority is ripe for *Congressional* review by the relevant oversight Committees." (emphasis added). That is precisely the point. If Congress is displeased with the powers of the FTC as interpreted by the Court of Appeals of this Circuit, it can alter the scheme. Congress has not taken the initiative to do so, and it is inappropriate for this Court to do so.[12]

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[8] Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 96-917, 96th Cong. 2d Sess., 29-30 (May 1, 1980), 126 Cong. Rec. H3157 (daily ed. May 1, 1980).

[9] See also Remarks of Congressman Luken, 126 Cong. Rec. H3964 (daily ed. May 20, 1980) and Senators Danforth, 126 Cong. Rec. S5683 (daily ed. May 21, 1980) and Metzenbaum, 126 Cong. Rec. S5688 (daily ed. May 21, 1980).

[10] See Statement of the Committee of Conference, H.R. Conf. Rep. 96-917, 96th Cong., 2d Sess., p. 29, which states that:

". . . the confereess believe the Commission should explore the possibility of issuing voluntary rules and guidelines in this area."

[11] See Statement of the Committee of Conference, H.R. Rep. No. 96-917, p. 29:

"The Senate amendment removed any authority of the Federal Trade Commission to promulgate a trade regulation rule concerning the development and utilization of private standards and certification activities."

[12] See *National Petroleum Refiners Association v. F.T.C.* 482 F.2d 672, 697 n. 40 (D.C. Cir. 1973).

Lastly, Plaintiffs claim that the holding of *National Petroleum* is limited to "narrowly tailored proscriptions of a recurring business practice" and does not extend to "broad regulatory program[s]" such as that contemplated by the proposed rule. This Court finds no support in *National Petroleum* for this contention and therefore concludes that there is no clear violation of Plaintiffs' statutory or constitutional rights on which interlocutory review of this pending rulemaking can be predicated.[13]

Plaintiffs' strongest argument in favor of this Court's jurisdiction is that the issues presented in this action—the Commission's jurisdiction and the adequacy of notice—are legal issues that do not require for their resolution the application of agency expertise or the development of further factual information. See *Sterling Drug,* 450 F.2d at 710-711.

Application of the doctrines of finality and exhaustion is not inflexible, but proceeds upon consideration of the purposes of the doctrines and the particular administrative scheme involved. *Association of National Advertisers, Inc. v. FTC,* 627 F.2d 1151, 1156 (D.C.Cir. 1979). Among these purposes is the avoidance of premature disruption of agency proceedings, *American Dairy of Evansville, Inc. v. Bergland,* 627 F.2d 1252, 1260 (D.C.Cir. 1980), and the avoidance of unnecessary appeals. *Sterling Drug,* 450 F.2d at 710. Thus, dismissal of an action may be appropriate because, if the agency discovers and corrects its earlier mistakes or if the administrative proceedings are allowed to go forward and the complaining party prevails, judicial review may be unnecessary. *Id.* This reasoning persuades the Court that review of the agency action at this stage is inappropriate. The Commission is not, as Plaintiffs gloomily portend, "forging ahead" with the rule. Rather it is taking what seems to be the imminently sensible approach of pausing and reassessing its position in light of the changed statutory environment in which it finds itself following enactment of the FTCIA. This Court is unwilling to cut short this administrative introspection. The Commission may ultimately decide that no rule is necessary and, of course, the need for judicial review will be obviated. If this does not occur, there is time enough then for Plaintiffs to challenge the resulting rule.

For the foregoing reasons, the Court concludes that Defendant's Motion for Summary Judgment should be granted and Plaintiffs' Motion for Summary Judgment denied. An appropriate Order accompanies this Memorandum Opinion.

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[13] To the extent that Plaintiffs' vague allegations of denial of its due process rights encompass any claims in addition to those addressed here, the Court can discern no basis on which a due process challenge to the agency action wil lie. Accordingly, there is no clear due process violation.

GROLIER, INC.
v.
FEDERAL TRADE COMMISSION et al.*

No. 80-1939 FTC Docket No. 8879

United States Court of Appeals, District of Columbia Circuit
February 5, 1982

1. **Only when related litigation exists or potentially exists, does attorney work product from terminated litigation remain exempt from FOIA disclosure.**

   In the context of a Freedom of Information Act request, attorney work product [554] from terminated litigation remains exempt from disclosure only when litigation related to the terminated action exists or potentially exists.

2. **Remand of case for reconsideration of applicability of work product privilege was proper in light of absence of litigation relating to original suit, which had been dismissed with prejudice several years prior to FOIA request.**

   In light of apparent absence of litigation related to civil penalty action filed against corporation by the Department of Justice, which was dismissed with prejudice several years prior to Freedom of Information Act request for documents constituting work product with respect to that action, remand was appropriate for reconsideration of applicability to those documents of work product exemption to Freedom of Information Act.

Appeal was brought from a judgment of the United States District Court for the District of Columbia, Thomas A. Flannery, J., denying Freedom of Information Act request for documents constituting work product with respect to civil penalty action which had been dismissed with prejudice several years before. The Court of Appeals, held that: (1) in the context of a Freedom of Information Act request, attorney work product from terminated litigation remains exempt from disclosure only when litigation related to the terminated action exists or potentially exists, and (2) in light of apparent absence of litigation related to civil penalty action filed against corporation by the Department of Justice, which was dismissed with prejudice several years prior to Freedom of Information Act request for documents constituting work product with respect to that action, remand was appropriate for reconsideration of applicability of exemption to Freedom of Information Act for work product. Ordered accordingly.

(*Syllabus, with substituted captions, taken from 671 F.2d 553.*)

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*Reported in 671 F.2d 553 (1982). Judgment reversed, — U.S. —; 103 S.Ct. 2209 (1983). For case before the Commission, see 91 F.T.C. 315.

Daniel S. Mason, San Francisco, Cal., of the bar of the Supreme Court of California, pro hac vice, by special leave of court, with whom *Frederick P. Furth, Thomas R. Fahrner, Michael P. Lehmann, Bruce J. Wecker, Steven J. Mehlman*, San Francisco, Cal., *Samuel H. Seymour, Allan Hoffman*, and *Rene A. Torrado*, Washington, D.C., were on the brief, for appellant. *Robert A. Seefried*, Washington, D.C., entered an appearance for appellant.

Robert E.L. Eaton, Jr., Asst. U.S. Atty., Washington, D.C., with whom *Charles F.C. Ruff*, U.S. Atty., *Royce C. Lamberth* and *Kenneth M. Raisler*, Asst. U.S. Attys., and *Charles Nelson*, Atty., F.T.C., Washington, D.C., were on the brief, for appellees.

Before WRIGHT, MACKINNON and WALD, *Circuit Judges*.

Opinion for the court PER CURIAM.

Opinion dissenting in part and concurring in part filed by *Circuit Judge* MACKINNON

PER CURIAM:

Appellant Grolier filed suit under the Freedom of Information Act (FOIA)[1] seeking documents relating to a covert investigation of one of its subsidiaries, the Americana Corporation. Federal Trade Commission (FTC) lawyers prepared these documents as part of a civil penalty action filed against Americana in 1972 by the Department of Justice. *United States v. Americana Corp.*, Civil No. 388-72 (D.N.J.). The *Americana* action involved alleged misrepresentation in door-to-door sales and false advertising. The action was dismissed with prejudice on November 17, 1976, after the FTC disobeyed a court order to turn over certain materials to the defendants.

In this FOIA case the District Court held that certain requested documents—Numbers 1, 3, 5, 6, and 7—constituted attorney work-product and that the FTC properly withheld them pursuant to Exemption 5[2] of the Freedom of Information Act.[3] *Grolier, Inc. v. FTC*, D. D.C. Civil Action No. 79-1215, Memorandum filed February 21, 1980 at 3, Joint Appendix (J.A.) 113; *Grolier, Inc. v. FTC*, D.D.C. Civil Action No. 79-1215, Memorandum filed June 13, 1980 at 2, JA 118.

There is no question that the documents involved were work-product prepared as part of the *Americana* action. Rather, the question on appeal is whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated.

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[1] 5 U.S.C. § 552 (1976).

[2] *Id.* § 552(b)(5).

[3] Grolier has withdrawn its claim for disclosure of Document 2. As for Document 4, we affirm the District Court's judgment that the document was exempt from disclosure under Exemption 5 as an attorney-client communication.

I. TEMPORAL SCOPE OF THE WORK-PRODUCT PRIVILEGE

Exemption 5 of FOIA "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). In the civil discovery context, **[555]** however, there exists a "dispute among the courts as to * * * whether the protection afforded by the [work-product] privilege lapses once the litigation has ended or the prospects of litigation have faded[.]" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C.Cir. 1980). Indeed, courts have followed three differenct approaches in deciding whether the work-product privilege extends beyond the termination of litigation.[4]

At one extreme, some courts have concluded that the work-product privilege applies only if the materials were prepared in anticipation of the very suit before the court; documents prepared for one case are thus freely discoverable in a different case. *E.g., United States v. Internat'l Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974) (document must be prepared in anticipation of litigation in the case in which the special immunity accorded to such material is sought); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa. 1970)(same); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 207 F.Supp. 407, 410 (M.D.Pa. 1962) (materials must be prepared for the case at bar); *Gulf Construction Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex.1959) (same); *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 534, 537 (D.Del. 1954) (same). At least one of these courts has noted that the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), involved materials prepared in anticipation of the litigation then before the court. *Gulf Construction Co. v. St. Joe Paper Co., supra*, 24 F.R.D. at 415.

At the other extreme, some courts have held that there is "a *perpetual* protection for work product" extending beyond the termination of the litigation for which the documents were prepared and reaching all subsequent suits. *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (emphasis added). *Accord, Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483-484 (5th Cir. 1973) (rationale for work-product rule scarcely less applicable to a closed case than to one still being contested); *United States v. O.K. Tire Co.*, 71 F.R.D. 465, 468 n.7 (D.Idaho 1976); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 43 (D.Md. 1974).

A third, intermediate approach is that the extension of the work-product privilege from one case to a subsequent one turns on "whether the first action was complete and upon the relationship between the first and second actions." 4 J. Moore, Federal Practice ¶ 26.64[2] at 26-415 (2d ed. 1979). In the same vein, another leading commentator has found the "sounder view'' to be that ''documents prepared for one case have the same protection in a second case, *at least if the two cases are closely related.*'' 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024 at 201 (1970) (emphasis added). *See* Cooper, *Work Product of the Rulesmakers,* 53 Minn.L.Rev. 1269, 1299 n.100 (1969) (view that privilege terminates is tenable ''only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giving rise to the one-time work product materials'').

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[4] Most cases dealing with this subject are from District Courts. Few discovery cases reach the appellate level because interlocutory orders are not appealable under the final order doctrine. Note, 1974 Duke L.J. 799, 817 n.95.

A substantial body of case law supports the conclusion that the work-product privilege extends to subsequent cases only when they are related. *See, e.g., Republic Gear Co. v. Borg-Warner Co.,* 381 F.2d 551, 557 (2d Cir. 1967); *Hercules Inc. v. Exxon Corp.,* 434 F.Supp. 136, 153 (D.Del.1977); *Midland Investment Co. v. Van Alstyne, Noel & Co.,* 59 F.R.D. 134, 138 (S.D.N.Y. 1973), The paradigmatic situation is posed by *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 275 F.Supp. 146 (E.D.Pa. 1967), where documents prepared in defense of a criminal antitrust action were found to be within the work-product rule in a subsequent civil antitrust suit.[5] **[556]**

[1] Extending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute.[6] *Hickman v. Taylor, supra,* 329 U.S. at 511, 67 S.Ct. at 393. '' '[B]ecause the privilege obstructs the search for truth and because its benefits are, at best, ''indirect and speculative,'' it must be ''strictly confined within the narrowest possible limits consistent with the logic of its principle.'' ' '' *In re Grand Jury Proceedings (FMC Corp.),* 604 F.2d 798, 802-803 (3d Cir. 1979) (*quoting In re Grand Jury Proceedings (Sun Co.),* 599 F.2d 1224, 1235 (3d Cir. 1979)).

The purpose of the privilege, as this court has made clear, ''is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself * * *.'' *Jordan v. U.S. Dep't of Justice,* 591 F.2d 753, 775 (D.C.Cir. 1978) (*en banc*) (emphasis in original; footnote omitted). Therefore, in order to fall within the scope of the privilege a document ''*must* 'relate to the conduct of either ongoing or prospective trials; [it must] include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial"'" *Exxon Corp. v. FTC,* 663 F.2d 120, 129 (D.C.Cir. 1980) (emphasis added; brackets in original) (*quoting Jordan v. U.S. Dep't of Justice, supra,* 591 F.2d at 775-776).

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[5] This intermediate view is consistent with *Mervin v. FTC,* 591 F.2d 821 (D.C.Cir. 1975), which the dissent cites. In *Mervin* the plaintiff brought suit for disclosure of documents under the FOIA *and* for job reinstatement and damages on the basis that his dismissal was wrongful. *Id.* at 824. Mervin sought disclosure of documents prepared by government attorneys while defending an earlier suit for job reinstatement he had brought, which had been dismissed for failure to exhaust administrative remedies. *Id.* at 825. Thus the documents Mervin sought as part of his second suit for reinstatement were the government's work product from his first suit for reinstatement. The two actions were not merely closely related, they were identical.

[6] Indeed, court extending the privilege to subsequent cases have often relied on the qualified nature of the privilege in doing so. *See, e.g., United States v. Leggett & Platt, Inc.,* 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied,* 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977) (''Were the work product doctrine an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery * * *.'').

When litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish. Indeed, "where the work-product materials in question were prepared for a distinct and prior * * * litigation, long completed, the policies underlying the work-product privilege have already been achieved." *In re Grand Jury Proceedings,* 73 F.R.D. 647, 653 (M.D.Fla. 1977).

Moreover, we deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith. "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). As this court wrote in *Mead Data Central, Inc. v. U.S. Dep't of Air Force,* 566 F.2d 242, 259 (D.C.Cir. 1977):

> The exemptions from the mandatory disclosure requirement of the FOIA are both narrowly drafted and narrowly construed in order to counterbalance the self-protective instincts of the bureaucracy which, like any organization, would prefer to operate under the relatively comforting gaze of only its own members rather than the more revealing "sunlight" of public scrutiny. Where there is a balance to be struck, Congress and the courts have stacked the scales in favor of disclosure and against exemption.

* * * * * * *

Accordingly, we hold that, in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists. **[557]**

II. APPLICATION OF THE "RELATED LITIGATION" TEST

[2] Grolier seeks documents prepared for the *Americana* action. Since that suit was dismissed with prejudice five years ago, it cannot be resurrected. Grolier is also a plaintiff in a Ninth Circuit case challenging an FTC order, but that case and order apparently are not related in any way to the *Americana* action. *See* FTC's "Statement of Material Facts as to Which There is No Genuine Issue," ¶ 9, JA 25. In addition, the FTC has long abandoned the covert investigation techniques discussed in the requested documents.

Under these circumstances, there does not appear to be any suit or potential suit related to the original *Americana* action. Nonetheless, since this issue has not been fully explored, we remand the case to the District Court for reconsideration of the applicability of the work-product privilege in light of the apparent absence of related litigation. This judgment applies to Documents 3, 5, 6, and 7. With respect to Document 1, while we find that the work-product privilege may not apply, the document is still exempt from disclosure under Exemption 5 because it is clearly a pre-decisional document. *See Jordan v. U.S. Dep't of Justice, supra,* 591 F.2d at 774. Thus, the judgment of the District Court as to Document 1 is affirmed.

The dissent would affirm the District Court's judgment because it concludes that "the present [FOIA] suit could not be more directly related to the *Americana* litigation." Dissent at 4. While we agree that the work-product privilege extends to a second case *if* the second case is closely related to the first, *see id.* at 3 (*citing* C. Wright & A. Miller), Judge MacKinnon has, in our judgment, misapplied this test. Indeed, we find it illogical to use the filing of an FOIA suit as the sole basis for foreclosing appellant's access to the requested documents. Under the dissent's theory, any material that was work product at any time would never be disclosable under FOIA because the filing of the FOIA suit itself would constitute "related" litigation. We reject this strange view of the related litigation test.

The *Americana* suit was a civil penalty action involving misrepresentation in door-to-door sales and false advertising. The government's investigation and litigation strategy in such an action obviously would have little, if anything, to do with its strategy in defending this FOIA suit. The FOIA suit does not in any way relate to the substance of the earlier litigation. Thus, *for purposes of the work-product privilege,* the two cases are neither "closely related" nor even "related."

III. CONCLUSION

For the reasons given above, we affirm the judgment of the District Court as to Documents 1 and 4. However, we vacate the judgment of the District Court as to Documents 3, 5, 6, and 7, and remand the case for reconsideration of the applicability of the work-product privilege in light of the apparent absence of litigation related to the *Americana* suit.

So ordered.

MacKinnon, *Circuit Judge* (dissenting in part and concurring in part).

I concur in the Judgment insofar as it affirms the Judgment of the District Court with respect to Documents 1 and 4 but respectfully dissent from the vacation of the Judgment of the District Court with respect to Documents 3, 5, 6 and 7 and the remand to the District Court.

The majority opinion does not apply existing law. In my opinion the Judgment of the District Court as to Documents 3, 5, 6 and 7 should be affirmed on the ground that said documents are exempt from disclosure as the "working papers" of the attorneys and within the "attorney-client privilege" as reflected in the exemption set forth in 5 U.S.C.§ 552(b)(5) ("Exemption 5") and because the termination of the litigation to which the work-product relates does not destroy this privilege. The majority opinion gives no credence to the "attorney-client privilege" of the work-product rule as embodied in Exemption 5. **[558]**

The work-product rule was first articulated by the Supreme Court in *Hickman v. Taylor,* 329 U.S. 495, 512, 67 S.Ct. 385, 394; 91 L.Ed. 451 (1947). There the Court, dealing primarily with work-product, i.e., statements taken by attorneys from potential witnesses, said:

> the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

Much later, the Supreme Court noted in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S.Ct. 1504, 1518, 44 L.Ed.2d 29 (1975) that the work-product rule was available to Government attorneys:

> It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5, and that such a privilege had been recognized in the civil discovery context by the prior case law . . . . [The] case law clearly makes the attorney work-product rule of *Hickman v. Taylor* . . . applicable to Government attorneys in litigation. Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy.

Our opinion in *Mervin v. FTC,* 591 F.2d 821, 825 (D.C.Cir. 1978) is to the same effect: (". . . it is clear that Exemption five includes the attorney work-product privilege").

The *Sears* opinion, by Justice White, also pointed out that the traditional "attorney-client privilege" was subsumed in the work-product rule carried into FOIA by Exemption 5:

> The Senate Report states that Exemption 5 "would include the working papers of the agency attorney *and documents which would come within the attorney-client privilege if applied to private parties,*" S.Rep.No. 813, p.2. . . .

421 U.S. at 154, 95 S.Ct. at 1518. (Emphasis added)

As the majority notes, the four documents in question in the instant case clearly qualify as work-product. Majority at 2. Under the applicable rules. "[p]arties may obtain discovery regarding any matter, not privileged" and when discovery is ordered the court is admonished to "protect against disclosure of the mental expressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." F.R.Civ.P. 26. Documents 5, 6 and 7 are memoranda prepared by an attorney that reveal the attorney's thought processes in the preparation of the case.

Document 3 contains advice and instructions given by an attorney as to procedures that the Government should follow with respect to the preparation of certain aspects of the case. This is clearly the work-product of an attorney setting forth his mental processes, opinion and legal theory. It is also *clearly* within the traditional "attorney-client privilege." There is no question that it is protected from disclosure by Exemption 5.

My *in camera* inspection of the six documents involved in this case convinces me that they are *all* covered by the work-product rule, and, accordingly, by Exemption 5. There is *nothing* therein that is not work-product or that plaintiff would need to start a lawsuit.

The majority neatly sidesteps this point by saying, in essence, that even though the documents are *bona fide* work-product, the work-product rule and Exemption 5 are inapplicable insofar as no litigation related to the original *Americana* suit, *United States v. Americana Corp.,* Civil No. 388-72 (D.N.J.), is currently under way and the methods of obtaining evidence discussed in the documents have apparently been long since discontinued.

This argument is *not* supported by the facts or the law. It is sound case law that "documents prepared for one case have the **[559]** same protection in a second case, at least if the two cases are closely related." C. Wright & Miller, Federal Practice and Procedure § 2024 at 200-201 (1970). *See Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 487 F.2d 480, 484 (4th Cir. 1971) (upon the termination of litigation the work-product documents of an attorney prepared incident thereto do not lose the qualified immunity extended to them under Rule 26(b)(3)); *Republic Gear Co. v. Borg-Warner Corp.,* 381 F.2d 551, 557-58 (2d Cir. 1967) (documents prepared by non-party attorney in prior litigation are protected from adversary disclosure in subsequent litigation as attorney's work-product and by attorney-client privilege where documents reflected attorney's mental processes); *Philadelphia Electric Company v. Anaconda American Brass Co.,* 275 F.Supp. 146, 147 (E.D.Pa. 1967) (documents prepared in defense of a criminal antitrust action are within the work-product rule in a subsequent civil action).

Other cases also hold that the work-product privilege as carried forth by Exemption 5 is not destroyed by the termination of initial litigation. In *Mervin v. FTC, supra,* wherein a former FTC employee sued unsuccessfully to force disclosure of documents related to an earlier suit for reinstatement, this court held that the work-product privilege may extend past the end of the litigation to which the work-product relates. *See also National Public Radio v. Bell,* 431 F.Supp. 509, 512 (D.D.C. 1977) ("Despite plaintiff's unsupported contention that Exemption 5 protection 'disappear(s) when no further legal action is in prospect,' there can be no doubt but that the documents in question fall squarely within the protective scope of . . . the exemption").

In the instant case, as the majority suggests, petitioner's request for disclosure relates directly to the FTC's April, 1973, investigation of Americana Corporation and Grolier Incorporated. That investigation resulted in *United States v. Americana Corporation, supra,* a civil penalty action filed by the government. The suit was dismissed on November 16, 1976.

Petitioner, who was a co-defendant in the earlier *Americana* suit, now requests disclosure under FOIA of documentary material prepared, and advice given, by government counsel that related directly to strategy and tactics to be followed by the government in the *Americana* litigation. Contrary to the majority's remarkable assertion that "the two cases are neither 'closely related' nor even 'related'," Majority at 9, the present suit could not be more directly related to the *Americana* litigation. The work-product privilege as embodied in Exemption 5, inclusive of the "attorney-client privilege [as] applied to private parties," would even in the majority's judgment, have applied in *Americana*. Therefore, it properly extends to the instant case as well. The majority attempts to divert attention from this most obvious of conclusions by decrying the fact that according to such a finding, "any material that was work product at any time would never be disclosable under FOIA because the filing of the FOIA suit itself would constitute 'related' litigation." At 557. This lament bespeaks a fundamental failure to grasp the *raison d'etre* of Exemption 5. It was precisely to protect *bona fide* work product and privileged attorney-client matter from the likes of FOIA requests that Exemption 5 was enacted in the first place. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518; *Mervin v. FTC,* 591 F.2d at 825. A FOIA request such as is made in the instant case is the typical "related" litigation contemplated by the statute. As such, it is properly turned away on Exemption 5 grounds.

The requested material is thus exempt as expressing the attorney's thoughts and strategies,[1] and because the ideas expressed **[560]** constitute *privileged* advice by an attorney to his client, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154, 95 S.Ct. at 1518. I would accordingly affirm the Judgment of the District Court in all respects and hold that the documents are exempt from disclosure under 5 U.S.C. § 552(b)(5).

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[1] The analysis of the majority places great weight on the fact that "[t]he government's investigation and litigation strategy in such an action obviously would have little, if anything, to do with its strategy in defending this FOIA suit." At 557. I am hard pressed to glean how this point bears the slightest relevance to this proceeding. The relative strategies in the two suits in question are immaterial in this inquiry. *All* we are concerned with here is that the strategies in the *original Americana* litigation were *bona fide* work product. That they were means that they are protected in the instant case by Exemption 5. The strategy employed by the government in the instant case is of absolutely no concern to us here and, accordingly, is useless in support of the majority's opinion.

[illegible] petitioner's request for [illegible] 1971 [illegible]

Petitioner, [illegible]

The [illegible] Co., 421 U.S. [illegible] 95 S.Ct. [illegible]

[illegible]

DONALD L. BACHMAN et al
v.
MICHAEL PERTSCHUK et al.*

No. 81-1906 FTC File No. 99-292

United States Court of Appeals, District of Columbia Circuit
February 16, 1982

On appeal from a ruling by a United States Magistrate which denied claims of five individuals, court dismissed the action holding that appellants were bound by a provision in the 1978 order settling a class action alleging racial discrimination by the FTC. That provision specified that the Magistrate's decision on individual claims was final and unappealable.

Before WRIGHT, MACKINNON** and ROBB, *Circuit Judges.*

ORDER

Upon consideration of appellees' motion to dismiss, and of the responses and reply thereto, and of appellants' motion and memorandum in support of summary reversal or in the alternative for enforcement of Rule 31(c) sanctions, it is

ORDERED by the Court that the motion to dismiss is granted, and it is

FURTHER ORDERED that apellants' motion for summary reversal or in the alternative for enforcement of Rule 31(c) sanctions is denied as moot.

A Memorandum of the Court is attached.
Per Curiam

MEMORANDUM

A class action alleging racial employment discrimination by the Federal Trade Commission (FTC) resulted in the District Court's approval in 1978 of a consent decree. The District Court's settlement order provided a claims procedure whereby individual class members could present their claims, first to the FTC and then to a United States Magistrate. The settlement order provided that the decision of the Magistrate would be final and unappealable.

After receiving notice of the terms of the settlement order, appellants elected to present claims pursuant to that order. Both the FTC and the Magistrate denied appellants' claims. Appellants then attempted to appeal the adverse decision of the Magistrate to this Court. We dismiss, because

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*Not otherwise reported. Rehearing *en banc* denied March 29, 1982; *cert. denied,* May 14, 1984.

**Circuit Judge MacKinnon did not participate in this order.

the appeal is precluded by the term of the settlement order making the Magistrate's decision unappealable.

Appellants argue that the provision of the settlement order making the decision of the Magistrate unappealable cannot apply to them, because of an alleged denial of due process in the District Court proceedings leading to entry of the settlement order. Appellants are thus claiming that the settlement order has no *res judicata* effect as applied to them. The Advisory Committee Notes to Federal Rule of Civil Procedure 23 state, however, that the *res judicata* effect of a class-action judgment "can be tested only in a subsequent action." Resort to a court of appeals in an attempt to challenge the Magistrate's decision, when the settlement order expressly makes the Magistrate's order unappealable, and when appellants freely chose to present their claims to the Magistrate, is not such a subsequent action.

Considered as an appeal of the settlement order itself, the appeal is clearly untimely. Appellants' other arguments are without merit.

UNITED STATES
v.
POTAMKIN CADILLAC CORP.*

No. 80 Civ. 5028 (KTD)

United States District Court, Southern District of New York
February 19, 1982

In an action seeking statutory forfeiture of $100 per day for 391 days for failure to file a financial information form required by FTC, court granted government's motion for summary judgment and ordered the firm to pay a statutory forfeiture of $39,100. Court rejected various defenses raised by defendant and held that although required report had been filed following initiation of instant suit, this merely served to cut off further accumulation of statutory forfeiture. It did not excuse the company from failing to file the report for 391 days after it had received FTC's notice of default.

Hon. John S. Martin, Jr., U.S. Atty., Southern District of New York, Atty., for the U.S., New York, N.Y. (*Jonathan A. Lindsey,* Asst. U.S. Atty., of counsel), for plaintiff.

Philip I. Beane, New York, N.Y., for defendant.

Before DUFFY, *District Judge:*

MEMORANDUM AND ORDER

The government moves for summary judgment in this case seeking the imposition of a $39,100 statutory forfeiture for failure to file a financial information form required by the Federal Trade Commission [''F.T.C.''] pursuant to 15 U.S.C. §§ 49 and 50.

The undisputed facts show that the defendant is engaged in interstate commerce; that the F.T.C. on February 1, 1980 issued a special order directing the defendant to file a special report, on an F.T.C. form attached to the order, covering the last quarter of 1979; that the order was served on defendant on February 11, 1980; that defendant did not move to quash or limit the order or to obtain an extension of time to do so; that the F.T.C. issued its notice of default to the defendant for failure to file the report; that the defendant actually received the notice of default on March 11, 1980; and that by letter of May 8, 1981, the defendant transmitted a partial report to government counsel which the government deems a filing of the required report. The report was not filed for 391 days after the per day forfeiture began running.

The defendant has alleged in its answer to the complaint that a timely filing had been made but in the letter on May 8, 1981, enclosing the partial

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*Reported in Trade Reg. Rep. ¶ 64,584 at 73,198 (1982-1 Trade Cases). *Cert. denied,* May 20, 1983.

report, defense counsel stated "I do not have the specifics of the filing, nor can I tell you which employee filed it. . . . I have no cover sheet nor any other items. There is nothing else I can give you on this matter." It is interesting to note that this partial filing took place only after the first pre-trial conference in this matter. In any event, no genuine issue of fact is created by such an unsubstantiated surmise or conjecture by the non-movant. *See Nemo v. Allen,* 466 F. Supp. 192, 195 (S.D.N.Y. 1980). In its reply papers to this motion it is alleged "As far as Potamkin could tell, the report was timely filed." That is not enough to raise a real question of fact. Furthermore, nowhere does the defendant allege when the report finally submitted was executed or where it came from. Cf. 18 U.S.C. § 1001.

The other defenses raised by the defendant are also unavailing. Contrary to the defendant's assertion, it was required to file the report. The fact that the defendant filed a report after this action was begun does not excuse its failure to do so when it was required—the filing merely cuts off the accumulation of the statutory forfeiture. The last asserted defense is almost an insult to our entire legal system—i.e., demands for reports and forms supplied by the government are confusing. If the defendant was confused by the F.T.C. orders and forms and by the necessity of filing the reports then it could have asked for assistance in comprehending the report requirements or an extension of time in which that understanding could be gained. The sophistry of this argument is shown by the following excerpt from the defendant's submission:

> The reports deal with trade and mining companies. *Potamkin* is certainly not mining company [sic]; the Court may take judicial notice of the fact that the defendant sells automobiles. Likewise, to call it a trade company is hard to conceive, as it is not a trading company, but a company that engages in the selling of automobiles, not in the barter of goods.

(Affidavit of Philip I. Beane, ¶ 3).

The government's motion is granted. Judgment will enter forthwith.

So Ordered.

BORDEN, INC.
v.
FEDERAL TRADE COMMISSION*

No. 79-3028 FTC Docket No. 8978

United States Court of Appeals, Sixth Circuit
February 24, 1982

1. **Proscriptions in the FTCA are flexible and are "to be defined with particularity by myriad of cases from field of business" and the Commission has been relegated power to determine when trade practices violate the Act.**

Federal Trade Commission Act declaring unlawful unfair methods of competition in commerce and unfair acts or practices in commerce and authorizing Commission to issue cease and desist orders relegated to Commission power to determine when practices violate the Act and statutory proscriptions are flexible and are to be defined with particularity by myriad of cases from field of business.

2. **If supported by substantial evidence, FTC findings are conclusive even where contrary findings are also supported by the evidence; and while court has the ultimate responsibility for construing the FTCA, Commission determinations carry great weight.**

While ultimate responsibility for construing Federal Trade Commission Act rests [499] with the courts, determinations of the Federal Trade Commission, an expert body charged with practical application of the statute, are entitled to great weight and its findings are conclusive if supported by substantial evidence, even though evidence might also support contrary finding.

3. **Appellate court may not pick or choose among uncertain and conflicting inferences to be drawn from the evidence, or second guess the ALJ and FTC on questions of credibility and testimonial weight.**

Task of Court of Appeals is not to second guess administrative law judge and Federal Trade Commission on questions of credibility and testimonial weight, nor may it pick and choose among uncertain and conflicting inferences to be drawn from the evidence.

4. **Petitioner bore burden of convincing court that evidence in the record failed to sufficiently support FTC findings and conclusions that petitioner had used unfair methods of competition in violation of Section 5 of the FTCA.**

On petition to review Federal Trade Commission's order finding that petitioner had violated Federal Trade Commission Act by using unfair methods of competition, petitioner had burden of persuading Court of Appeals that evidence in record was not sufficient to support Commission's findings and conclusions.

5. **Although trade practices which conflict with basic policies of the Sherman and Clayton Acts may not actually violate those laws, it has been well established that FTC has broad power to determine whether a trade practice is unfair.**

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*Reported in 674 F.2d 498 (1982); *cert. granted* on May 23, 1983, with instructions that case be remanded to the FTC for entry of the cease and desist order to which the parties have agreed, 461 U.S. 940. For case before the Commission, see 92 F.T.C. 669.

Federal Trade Commission has broad power to determine whether practice is unfair, particularly with regard to trade practices which conflict with basic policies of Sherman and Clayton Acts, even though such practices may not actually violate those laws.

6. **In determining what constitutes an unfair commercial act or practice or an unfair method of competition, FTC may construe Section 5 of the FTCA in *pari materia* with antitrust laws which may serve as a guide or declaration of policy for FTC to consider.**

Section 5 of Federal Trade Commission Act declaring to be unlawful unfair methods of competition in commerce and unfair acts or practices in commerce may be construed in *pari materia* with antitrust laws which may serve as guide or declaration of policy for Federal Trade Commission to consider in determining what constitutes unfair method of competition.

7. **Judicial review of FTC determination should be limited to grounds relied upon by the Commission for its decision.**

Court of Appeals' review of decision of Federal Trade Commission should be restricted to grounds relied upon by the Commission.

8. **Similarity of end uses, price and quality differences and low cross elasticity of demand between products are factors for consideration in assessing reasonable interchangeability of products, for purposes of determining whether there has been maintenance of monopoly power.**

In assessing reasonable interchangeability of products for purposes of determining whether there has been maintenance of monopoly power, similarity of end uses of products, price differences, low cross elasticity of demand, and quality differences are to be considered.

9. **In considering whether competition from other products prevents possession of monopoly power, price and competition are so entwined that any theoretical discussion must treat them as one, since monopoly power is equated with power to exclude competition or control prices.**

Monopoly power is equated with power to control prices or exclude competition and, as a consequence, in examining whether competition from other products prevents possession of monopoly power, price and competition are so intimately entwined that any discussion of theory must treat them as one.

10. **Record supported Commission findings that low cross elasticity of demand existed between fresh lemons and processed lemon juice, that the products were not reasonably interchangeable, and that processed lemon juice was valid submarket for assessing FTC charges of unfair methods of competition.**

In proceeding on complaint charging unfair methods of competition through promotional pricing of brand name reconstituted lemon juice in geographic markets in which processor faced competition, with intent to maintain monopoly power, evidence supported Commission's finding that low cross elasticity of demand existed between fresh lemons and processed lemon juice, that processed juice was not reasonably interchangeable with fresh lemons, and that processed lemon juice was valid submarket in which to assess allegations of complaint.

11. **In determining reasonable interchangeability of products in a competitive market, quality differences between the products must be considerated if they are such that a consumer, in making purchasing decision, would not consider one product as a viable substitute for use of another.**

With respect to maintenance of monopoly power, if quality differences between two products are such that consumers would not consider one product a reliable substitute for other in making their pur**[500]**chasing decisions, regardless of whether one product actually can be substituted for use of another, then those quality differences must be considered in determining reasonable interchangeability of products in a competitive market.

12. **There is no need to differentiate between Clayton Act's "line" of commerce and Sherman Act's "part" of commerce, since submarkets, as separate economic entities, may be found in both Clayton Act and Sherman Act cases.**

Submarkets, as separate economic entities, may be found in Sherman Act cases as well as Clayton Act cases and there is no reason to differentiate between "line" of commerce in context of Clayton Act and "part" of commerce for purposes of Sherman Act.

13. **In action dealing with unlawful maintenance of monopoly power under Sec. 5 of the FTCA, it is appropriate to use submarket criteria to define the relevant market.**

Use of submarket criteria is appropriate to find relevant market in case dealing with unlawful maintenance of monopoly power under section 5 of the Federal Trade Commission Act which declares unlawful any unfair methods of competition in commerce and unfair acts or practices in commerce.

14. **Only a careful factual analysis of relevant product market can reveal whether monopoly power actually exists, and while existence of monopoly power may be inferred from a predominant share of the market, such inference need not automatically follow.**

Existence of monolopy power may be inferred from predominant share of the market, but such inference does not have to follow automatically and only a careful factual analysis of market in question will reveal whether monopoly power, in fact, exists.

15. **Monopoly power was more than sufficiently inferred by fact that one brand name, processed lemon juice held predominant share of the market on both a liquid volume basis and a dollar basis.**

Fact that national market share of one brand name processed lemon juice ranged from 83 percent to 75.3 percent on liquid volume basis and from 91.8 percent to 88.9 percent on dollar basis was more than sufficient to infer monopoly power.

16. **Monopoly power existed where seller, who maintained a dominant share of the submarket, was able to command a premium price for its product and reap greater profits than competitors due to successful product differentiation through extensive advertising, and control competition by selective promotional allowances, and where such capabilities tended to act as a barrier to market entry.**

One processor possessed monopoly power in processed lemon juice submarket where it sold from 88 percent to 75.3 percent of juice, it charged premium price when there was no objective differences in quality, it maintained product differentiation through extensive advertising, by selective promotional allowances, it could adjust its net wholesale prices and control price competition, its brand name, advertising and ability to command premium price acted as barrier to entry into market, it realized high rate of return on its assets, and it had far greater resources to finance advertising and promotions than its nearest competitor.

17. If lawfully acquired, mere possession of monopoly power in market is not unlawful per se.

Mere possession of lawfully acquired monopoly power in market is not per se unlawful.

18. Willful acquisition and use of monopoly power to foreclose competition or gain a competitive advantage is unlawful, not growth or development stemming from superior product, business acumen or historic accident.

Sherman Act is violated by willful acquisition of monopoly power as distinguished from growth or development as consequence of superior product business acumen or historic accident, and it is use of monopoly power to foreclose competitor or gain a competitive advantage that is unlawful.

19. Ordinarily, all that is required to find a Sherman Act violation is general intent to restrain or monopolize trade, and while showing of predatory conduct by possessor of monopoly power, such as below-cost pricing or price discrimination, is essential to such finding, acts or practices used to maintain monopoly power need not be independently unlawful in themselves.

Predatory conduct by one possessing monopoly power, such as below-cost pricing or price discrimination, is generally required to find violation of Sherman Act, but it is not essential to finding of monopolization that acts or practices used to maintain monopoly power be in themselves independently unlawful nor is it always necessary to find a specific intent to restrain trade or monopolize, and general intent to monopolize is all that is ordinarily required to find a Sherman Act violation. [501]

20. Monopolist's intention to maintain monopoly power, increase market share and stifle further expansion by major competitor by using monopoly profits to subsidize price reductions or promotional allowances in intensely competitive areas violated the Sherman Act and restrained competition in violation of the FTCA.

Processor of reconstituted lemon juice, unlawfully restrained competition in violation of Federal Trade Commission Act and violated Sherman Act by intending to maintain its monopoly power, increase its market share, and stifle further expansion by major competitor by use of price reductions or promotional allowances in selected geographic areas, enabling it to use monopoly profits from areas of little competition to subsidize price reductions in areas of intense competition.

21. Maintenance of market position through manipulation of prices which required competitors to sell below their average variable costs constituted an improper use of monopoly power to restrict competition.

When a monopolist, through brand identification or otherwise, can and does manipulate prices to exclude equally efficient competitors by requiring them to sell below their average variable costs, such price manipulation is unreasonable use of power to maintain monopolist's market position.

22. Courts should not lightly modify Commission orders or interfere where remedy is reasonably related to violation found, since Congress has endowed FTC with wide

discretion and primary responsibility to shape appropriate remedies for unfair trade practices.

The Federal Trade Commission has wide discretion in determining kind of order necessary to cope with unfair practices found and, because Congress has placed on Commission the primary responsibility for shaping remedies, court should not lightly modify Commission's order and should interfere only where there is no reasonable relation between remedy and the violation.

23. **FTC order barring any unjustified price discrimination that adversely affects competition in any geographic area was reasonable where processor used selective geographic promotions and price cuts to eliminate competition from regional competitors and then recouped profit losses by raising prices back to monopolistic levels.**

Since selected geographic promotions and price cuts were processor's primary tools in hindering competition from smaller regional competitors for sale of processed lemon juice and, once processor eliminated threat of price competition, producer could recoup reduced profits or losses by raising prices back to monopolistic levels, Federal Trade Commission's order prohibiting any price discrimination, not justified by cost differentials, in any geographic area that adversely affected competition was reasonable.

24. **When "otherwise lawful practices and activities" are likely to be used for an unlawful purpose, FTC has authority to restrict them.**

Federal Trade Commission has authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose.

25. **When considered in the context of FTC's opinion and complaint from which it arose, challenged language in order prohibiting petitioner from selling its products below cost and at "unreasonably low prices" was not so vague as to be unenforceable.**

Federal Trade Commission's order prohibiting petitioner from selling its product below its costs or at unreasonably low prices was not so vague as to be unenforceable, since opinion clearly demonstrated that selling below cost referred to selling below average total cost and that unreasonably low prices referred to sales made at or near average cost with intent to restrain unreasonably competition and Commission explained basis for determining whether price was unreasonably low.

26. **Modification of FTC order was not warranted by concern that hypothetical conduct might violate the order.**

Concern that hypothetical conduct might violate FTC order was an insufficient reason for modification.

Petition was filed to review an order of the Federal Trade Commission holding that petitioner had violated the Federal Trade Commission Act by using unfair methods of competition in sale of reconstituted lemon juice. The Court of Appeals, Harry Phillips, Senior Circuit Judge, held that: (1) evidence supported Commission's finding that low cross elasticity of demand existed between fresh lemons and processed lemon juice, that processed juice was not reasonably interchangeable with fresh lemons, and that processed lemon juice was valid submarket in which to assess allegations of complaint; (2) petitioner possessed monopoly power in the submarket where it sold from 88 percent to 75.3 percent of juice, it charged premium price when there was no objective differences in quality, it maintained product differentation through extensive advertising, by selective promotional allowances, it could adjust its net wholesale prices and control price competition, its brand name, advertising and ability to command premium price acted as barrier to entry into market, it realized high rate of return on its assets, and it had far greater resources to finance advertising and promotions than its nearest competitor; and (3) petitioner unlawfully restrained competition in violation of Federal Trade Commission Act and violated Sherman Act by intending to maintain its monopoly power, increase its market share, and stifle further expansion by major competitor by use of price reductions or promotional allowances in selected geographic areas, enabling it to use monopoly profits from areas of little competition to subsidize price reductions in areas of intense competition

Commission's order affirmed and enforced.

Cornelia G. Kennedy, Circuit Judge, dissented and filed opinion.

(*Syllabus, with substituted captions, taken from 674 F.2d 498*)

H. Blair White, Sidley & Austin, Charles W. Douglas, Chicago, Ill., *Walter W. Kocher,* Borden, Inc., *Harvey A. Rosenzweig, Edward A. Matto,* Columbus, Ohio, for petitioner.

Edward F. Glynn, Jr., Michael N. Sohn, Gen. Counsel, *Howard Shapiro, W. Dennis Cross, Jerold D. Cummins,* F.T.C., Washington, D.C., for respondent.

Before KENNEDY and JONES, *Circuit Judges,* and PHILLIPS, *Senior Circuit Judge.*

PHILLIPS, *Senior Circuit Judge:*

This case is before the court on a petition to review an order of the Federal Trade Commission, finding that Borden, Inc., the petitioner, violated § 5 of the Federal **[502]** Trade Commission Act, 15 U.S.C. § 45. The decision and order of the Commission are reported at 92 F.T.C. 669-833 (1978). The Commission found that Borden used unfair methods of competition in the sale of a reconstituted lemon juice product known as ReaLemon. The complaint charged unfair methods of competition through promotional pricing of ReaLemon in geographic markets where Borden faced competition from Golden Crown Citrus Corporation, a recent entrant into the reconstituted lemon juice business, with the unlawful intent to maintain ReaLemon's monopoly power.

The principal issues are (1) what is the relevant product market within which Borden's conduct should be assessed, (2) whether Borden possessed monopoly power within the relevant product market, (3) whether Borden's acts and practices in the sale of ReaLemon amounted to the illegal maintenance of its monopoly power, and (4) whether the Commission's remedy was related reasonably to the alleged unlawful practice it sought to curtail. For the reasons stated below, the court concludes that the findings of the Commission are supported by substantial evidence on the record and the prescribed remedy is within the power of the Commission. Accordingly, we affirm the opinion and order.

I

The ReaLemon business was begun in 1935. The original product was bottled lemon juice. Subsequently the product was changed to reconstituted lemon juice, made from lemon juice concentrate, water and a preservative. Reconstituted lemon juice was marketed successfully as a convenient substitute for fresh-squeezed lemon juice. Sometime in the 1940's the ReaLemon trademark was developed and used for the reconstituted lemon juice product. At that time ReaLemon was the only nationally advertised and distributed processed lemon juice, and its advertising during the 1940's and 1950's was aimed at converting users of fresh lemons to the ReaLemon product.

During the late 1950's and 1960's local business concerns began bottling reconstituted lemon juice in competition with ReaLemon on a regional basis. The emphasis of ReaLemon's advertising and pricing was changed in response to this competition. Sunkist was the only bottler of reconstituted lemon juice to attempt to compete with ReaLemon on a national basis, but in the late 1950's and early 1960's Sunkist retrenched to regional distribution. Since that time ReaLemon has remained the sole nationwide bottler and distributor of reconstituted lemon juice.

Borden purchased the ReaLemon-Puritan Company in 1962 for approximately $12.4 million. Borden has operated its wholly owned subsidiary as ReaLemon Foods.[1] At the time of the complaint, Borden had annual sales of over $2 billion, its 1972 income after taxes was $66 million, and it had assets of approximately $1.3 billion. In 1973 sales of reconstituted lemon juice by Borden's subsidiary totaled about $22 million, generating a net income of $3.5 million.

By comparison, Golden Crown Citrus Corporation was a small company based in Chicago in the late 1960's which produced and sold reconstituted lemon juice in the Chicago area. In 1969 Golden Crown embarked on a plan to expand its sales beyond Chicago to the midwest and later to other markets in the northeast and southeast. Golden Crown's method of expansion was to sell its product to retailers at prices well below those of ReaLemon. It relied almost entirely on its lower prices for its acceptance in other markets. The Commission found that retailers usually have only enough shelf space for two brands of reconstituted lemon juice and they generally limited their sales to ReaLemon and the brand of one lower priced competitor. Consequently, from 1969 through 1971 Golden Crown's expansion into other geographic areas succeeded mainly at the expense of other local **[503]** competitors Golden Crown displaced on store shelves. In 1971, however, the significant price differential between Golden Crown and ReaLemon began to make inroads on the sales of ReaLemon. Borden's response to this competition from Golden Crown forms the principal basis of the FTC complaint charging Borden with unlawfully maintaining monopoly power in the production, distribution and sale of reconstituted lemon juice in the United States.

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[1] Since ReaLemon is a wholly owned subsidiary of Borden, their names are used interchangeably in this opinion.

II

On July 2, 1974, the FTC issued a complaint charging Borden with violations of § 5 of the Federal Trade Commission Act. Administrative Law Judge (ALJ) Daniel Hanscom conducted extensive hearings, received several thousand pages of exhibits and heard testimony from numerous economists and experts on behalf of Borden and the FTC.[2] On August 19, 1976, ALJ Hanscom issued a comprehensive initial decision finding that Borden had violated § 5.[3] The ALJ found that for purposes of analyzing Borden's conduct, the relevant product market was processed lemon juice.[4] Because of different product characteristics, and economic and commercial realities, the ALJ rejected Borden's contention that the relevant market included fresh lemon, finding instead that processed lemon juice was, at the least, a proper submarket.[5] Based upon Borden's share of the relevant market, the industry concentration ratios, ReaLemon's dominant brand name, its ability to command a premium price because of strong consumer preferences, ReaLemon's rate of return on its assets, Borden's substantial resource advantages, and ReaLemon's power to control prices and entry into the market, the ALJ further found that Borden possessed monopoly power within the processed lemon juice market.[6] He found Borden had maintained this monopoly power unlawfully through extensive promotions and price reductions in selected geographic markets where it faced competition from Golden Crown. He further found that the 32 ounce size ReaLemon[7] was sold to large grocery chains in Philadelphia and Buffalo at "unreasonably low prices." Because of the premium price the ReaLemon brand name commanded, ReaLemon's promotions and unreasonably low prices forced competitors either to sell their product at prices below their costs or lose their share of the market to Borden. The ALJ determined that these practices violated § 5, and ordered Borden to grant compulsory trademark licensing of the ReaLemon name and label design for ten years. The ALJ further ordered that Borden cease and desist from granting price reductions resulting in different net prices among ReaLemon customers competing in the same geographic area, selling ReaLemon below costs or at unreasonably low prices with the effect of hindering competition, and granting promotional allowances with the effect of hindering or eliminating competition.

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[2] The hearings extended over a period of seven weeks, with testimony from 74 witnesses. The hearing transcript totaled over 6,000 pages with an additional 12 binders of exhibits.

[3] *Borden, Inc.*, 92 F.T.C. 669 (1978).

[4] Processed lemon juice was defined by the Commission as including reconstituted lemon juice, frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice and imitation lemon juice. The geographic market was found to be the United States as a whole.

[5] 92 F.T.C. at 675-702.

[6] 92 F.T.C. at 702-718.

[7] ReaLemon was sold in various sizes and containers but the 32-ounce size bottle was the primary concern of the F.T.C. complaint because this size was promoted heavily by Borden in competition with Golden Crown's 32-ounce size.

Borden appealed the initial decision of the ALJ to the Commission. The opinion and order[8] of the Commission were filed November 7, 1978. The Commission adopted the factual findings of the ALJ, made further findings and modified the remedy. With respect to the relevant product market, the Commission disagreed with Borden's assertion that a submarket analysis **[504]** was improper in a case involving the unlawful maintenance of monopoly power. Applying the criteria of *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Commission held that processed lemon juice constituted a valid submarket within which to analyze Borden's business practices and that fresh lemons were properly excluded.[9] The Commission also adopted the finding of the ALJ that Borden possessed monopoly power within the product market.

In finding that Borden unlawfully maintained its power through the predatory pricing of ReaLemon, the Commission found that neither Borden nor Golden Crown was appreciably more efficient than the other and that ReaLemon's sales in Buffalo and Philadelphia at "unreasonably low prices," without cost justification, were below its average total costs.[10] In order to overcome ReaLemon's significant premium price advantage, competitors such as Golden Crown had to price well below ReaLemon, and below their own average variable costs, to survive in the market. The Commission found that Borden had practiced predatory pricing with the intent to exclude an equally efficient competitor, Golden Crown.

The Commission modified the remedies proposed by the ALJ, by eliminating the requirement that Borden license the ReaLemon trade name. A majority of the Commission felt that the prohibition against unreasonably low prices was a sufficient means of dissipating Borden's illegally used monopoly power without resorting to the more drastic step of compulsory trademark licensing. In addition, the Commission narrowed the scope of the order of the ALJ by prohibiting price reductions resulting in different net prices among ReaLemon customers only in geographic areas where the price differences were not cost justified and in effect restrained or eliminated competition.

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[8] 92 F.T.C. 778.

[9] 92 F.T.C. at 784-88. The F.T.C. found that even without resort to the *Brown Shoe* submarket criteria, processed lemon juice was the relevant product market.

[10] Commissioners Clanton and Pitofsky while concurring with the opinion of the Commission, proposed different tests for determining the maintenance of monopoly power.

III

It is to be emphasized that the present action is to review an order an opinion of the Commission—it is not a suit under the Sherman or Clayton Acts.

[1] The Federal Trade Commission Act, authorizing the Commission to issue cease and desist orders, is "not a revenue-raising or a penal measure," *United States v. St. Regis Paper Co.*, 355 F.2d 688, 693 (2d Cir. 1966). To make effective its policy to preserve and promote competition, Congress "relied upon the initiative of administrative officials and the flexibility of the administrative process." *United States v. Morton Salt Co.*, 338 U.S. 632, 640, 70 S.Ct. 357, 362, 94 L.Ed. 401 (1950). Congress intentionally left § 5 broad and generally undefined, delegating power to the Commission to determine when practices violate the Act. The proscriptions in § 5 are flexible and are "to be defined with particularity by the myriad of cases from the field of business." *F.T.C. v. Colgate Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965). In *Atlantic Refining Company v. F.T.C.*, 381 U.S. 357, 367, 85 S.Ct. 1498, 1505, 14 L.Ed.2d 443 (1965), the Supreme Court emphasized the function of the Commission to deal with changing business practices as follows:

> Section 5 of the Federal Trade Commission Act declares "[u]nfair methods of competition in commerce and unfair . . . acts or practices in commerce . . . unlawful." In a broad delegation of power it empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce . . . ." S.Rep. No. 592, 63d Cong., 2d Sess., 13. As the conference report stated, unfair competition could [505] best be prevented "through the action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H.R. Conf.Rep. No. 1142, 63d Cong., 2d Sess., 19. In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight. See *Federal Trade Comm'n v. Cement Institute,* 333 U.S. 683, 693 [68 S.Ct. 793, 799, 92 L.Ed. 1010] (1948).

(*See also American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 769 (6th Cir. 1966).

[2, 3] We turn now to the standards to be applied in reviewing the factual findings and conclusions of the Commission. While the ultimate responsibility for construing the FTC Act rests with the courts, "the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight." *F.T.C. v. Texaco,*

393 U.S. 223 at 226, 89 S.Ct. 429 at 431, 21 L.Ed.2d 394.[11] The findings of the Commission are conclusive if supported by substantial evidence, *J.B. Williams Co. v. F.T.C.*, 381 F.2d 884, 891 (6th Cir. 1967), even though the evidence might also support a contrary finding. *American Home Products Corp. v. F.T.C.*, 402 F.2d 232, 237 (6th Cir. 1968). Our task is not to second guess the Administrative Law Judge and the Commission on questions of credibility and testimonial weight, *Charles Pfizer v. F.T.C.*, 401 F.2d 574, 584 (6th Cir. 1968), *cert. denied,* 394 U.S. 920, 89 S.Ct. 1195, 22 L.Ed.2d 453 (1969);[12] nor, as Borden advocates, are we to pick and choose among uncertain and conflicting inferences to be drawn from the evidence. *Safeway Stores, Inc. v. F.T.C.*, 366 F.2d 795, 800 (9th Cir. 1966), *cert. denied,* 386 U.S. 932, 87 S.Ct. 954, 17 L.Ed.2d 805 (1967).

The substantial evidence rule for reviewing an FTC order has been described as follows:

> We have consistently reiterated—and we emphasize the point again now—that when Congress has vested in a Federal agency plenary authority to investigate and regulate particular forms of commercial or economic activity, entrusting it with primary responsibility for the resolution of complex and usually sharply disputed factual issues, appellate court review of the exercise of that authority is confined by the narrow perimeter of the substantial evidence rule. Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive. The findings must stand unless they were wrong, and they cannot be wrong—that is, reversibly wrong—if substantial evidence supports them.

(Footnotes omitted), *Colonial Stores v. F.T.C.*, 450 F.2d 733, 739-40 (5th Cir. 1971).

[4] Thus Borden has the burden of persuading this Court that the evidence in the record is not sufficient to support the Commission's findings and conclusions. Borden argues that the testimony of certain witnesses on behalf of the FTC is not credible, that other inferences may be drawn from the voluminous testimonial and documentary evidence, and that the expertise of the Commission should be disregarded in reviewing its economic analysis of the conflicting definitions of predatory pricing advocated for this case. These arguments are contrary to the standards of review to be applied by this court. Congress has delegated to the Commission, an administrative agency possessing specialized knowledge of marketing techniques and sales practices, the initial responsibility of resolving the knotty, technical economic problems **[506]** presented by Borden's conduct.[13] This court holds that the

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[11] *See also, Atlantic Refining Co., supra,* 381 U.S. at 368, 85 S.Ct. at 1505; *F.T.C. v. Cement Institute,* 333 U.S. 683, 720, 68 S.Ct. 793, 812, 92 L.Ed. 1010 (1948). Even when the Commission's findings are framed in terms of legal conclusions, their presumptive validity is considerable. *Colonial Stores, Inc. v. F.T.C.*, 450 F.2d 733, 740 n. 14 (5th Cir. 1971).

[12] *See also Guziak v. F.T.C.*, 361 F.2d 700, 703 (8th Cir. 1966), *cert. denied,* 385 U.S. 1007, 87 S.Ct. 712, 17 L.Ed.2d 545 (1967).

[13] *See F.T.C. v. Texaco,* 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968).

inferences drawn from the evidence by the Commission, and its findings and conclusions, are supported by substantial evidence.

IV

[5, 6] The broad power of the Commission to determine whether a practice is unfair is "particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws." *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321, 86 S.Ct. 1501, 1504, 16 L.Ed.2d 587 (1966). Section 5 may be construed *in pari materia* with the antitrust laws, *American Cyanamid, supra,* 363 F.2d at 770, and the antitrust laws may serve as a guide or declaration of policy for the Commission to consider in determining what constitutes an unfair method of competition. *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 351 (3rd Cir. 1964), *aff'd,* 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965); *Luria Brothers & Co. v. F.T.C.*, 389 F.2d 847, 859-60 (3rd Cir.), *cert. denied,* 393 U.S. 829, 89 S.Ct. 94, 21 L.Ed.2d 100 (1968).

Although it is well settled that methods of competition need not violate the Sherman or Clayton Acts in order to constitute a violation of § 5 of the Federal Trade Commision Act,[14] in the present case, the Commission seems to have restricted itself to a Sherman Act analysis, as indicated in the following language of its opinion:

> Although this case was brought and is decided under Section 5 of the FTC Act, it sounds basically in monopolization. Accordingly, the law under Section 2 of the Sherman Act is used to provide guidance for the application of Section 5, both as to the issue of market definition and the substantive standard of illegality.[15]

Although there is language in the majority decision of the Commission suggesting determination under the standards of the FTC Act unlimited by the strictures of the Sherman Act, the decision seems to rest primarily on the law of monopolization under the Sherman Act. At one point the opinion states:

> In light of these overriding policies we must determine whether Borden's maintenance of monopoly control over the processed lemon juice market was economically inevitable, or whether, like Alcoa, it "meant to keep, and did keep" that control over the market with which it started. *Id.* at 432.
>
> That Borden, in the words of the *Alcoa* court, "meant to keep" its monopoly share is evident from its marketing plans.[16]

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[14] *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 351 (3rd Cir. 1964), *aff'd,* 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965); *Luria Brothers & Co. v. F.T.C.*, 389 F.2d 847, 859-60 (3rd Cir.), *cert. denied,* 393 U.S. 829, 89 S.Ct. 94, 21 L.Ed.2d 100 (1968).

[15] 92 F.T.C. at 781, n. 4.

[16] 92 F.T.C. at 795.

The Commission concluded that: "It can hardly be said that the maintenance of Borden's monopoly power was 'economically inevitable' . . . . Its maintenance was the result of a calculated strategy employing geographic price discrimination . . . ."[17]

The ALJ relied upon Sherman Act cases to find Borden guilty of monopolization.[18] Commissioner Pitofsky stated in his concurrence that the decision of the Commission rests on the conclusion that Borden violated § 2 of the Sherman Act.[19]

[7] We restrict our review of the Commission's decision to the Sherman Act § 2 grounds relied upon by it. *Industrial Union Department AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 631, n. 31, 100 S.Ct. 2844, 2858, n. 31, 65 L.Ed.2d 1010 (1980); *Securities and Exchange Commis*[507]*sion v. Chenery Corp.,* 318 U.S. 80, 87-88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943).

V

The Commission's definition of the product market as processed lemon juice was crucial to its finding of maintenance of monopoly power. The inclusion of fresh lemons within the product market necessarily would preclude a finding of monopoly power because this would have reduced Borden's market share.[20] Borden contends that the undisputed facts establish that fresh lemons are reasonably interchangeable for every end use of ReaLemon, that the use of a submarket test under the Clayton Act is improper in a monopolization case, and that the evidence was not sufficient to support the finding that the processed lemon juice market did not include all other products containing lemon juice.

[8,9] Borden's contention that fresh lemons and ReaLemon are reasonably interchangeable emphasizes the similarity of the end uses of the two products, and de-emphasizes other factors such as price differences, low cross-elasticity of demand, and quality differences between fresh lemons and ReaLemon. However, under *United States v. E.I. DuPont de Nemours & Co.,* 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) (*Cellophane*), all of these factors are to be considered in assessing the reasonable interchangeability of products.[21] It is now well established that monopoly power is equated with the power to control prices or exclude competition.[22] As a consequence, in examining whether competition from other product

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[17] 92 F.T.C. at 802.

[18] 92 F.T.C. at 767.

[19] 92 F.T.C. at 826.

[20] Annual sales of fresh lemons were stated as approximately $200,000,000, and the inclusion of fresh lemons in the product market would reduce Borden's market share to less than ten per cent.

[21] "[The] market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Cellophane, supra,* 350 U.S. at 404, 76 S.Ct. at 1012.

[22] *United States v. Grinnell Corp.,* 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *Cellophane, supra,* 351 U.S. at 391, 76 S.Ct. at 1004.

prevents the possession of monopoly power, "[p]rice and competition are so intimately entwined that any discussion of theory must treat them as one." *Id.* at 392. 76 S.Ct. at 1005. In *Cellophane* the court discussed the reasonable interchangeability of products in terms of cross-elasticity of demand,[23] and in terms of comparative costs of the products to consumers.[24]

[10] The Commission's finding that low cross-elasticity of demand existed between fresh lemons and processed lemon juice is supported by the record. Buyers for large supermarket chains and representatives of processed lemon juice companies testified that price increases or decreases in fresh lemons had little or no effect on the prices or demand for processed lemon juice. This indicates they are in different competitive **[508]** markets. ReaLemon Food's president testified that increased prices for fresh lemons for a typical year did not cause an increase in either ReaLemon sales or reconstituted lemon juice sales as a whole.[25] Representatives of several regional processed lemon juice distributors agreed that changes in the price of fresh lemons had little effect on the price of processed lemon juice.[26]

Testimony as to other important differences in the prices of fresh lemons and processed lemon juice support the Commission's finding of different markets. An executive vice president of a supermarket chain in the New York City area testified that the price of fresh lemons fluctuates on a weekly and even a daily basis.[27] Representatives of processed lemon juice companies stated that the prices of processed lemon juice are stable for long periods of time. Borden's own marketing plans, as well as testimony from other distributors, demonstrated that processed lemon juice prices were determined primarily in response to prices of competing brands of processed lemon juice. The Commission also considered the substantial price differences between fresh lemons and reconstituted lemon juice. One ounce of ReaLemon is roughly equivalent to the juice of one fresh lemon; thus, a 32 ounce bottle of ReaLemon is equivalent to the juice of about 32 lemons. Yet ReaLemon's 1973 marketing plan stated that the juice from fresh lemons costs between three and five times more than ReaLemon. Since ReaLemon sold at a premium price and competing brands consistently had to sell at lower prices, the price differential between other brands and fresh lemons was even larger. Despite this substantial price gap, the volume of sales of fresh lemons is much greater than processed lemon juice and has not declined as processed lemon juice sales have grown over the years.

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[23] "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade." *Id.* at 394, 76 S.Ct. at 1006. The court examined the cross-elasticity of demand between cellophane and other flexible wrappings as follows:

> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market. The court below held that the "[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes" prevented du Pont from possessing monopoly control over price. [*U.S. v. E.I. DuPont De Nemours & Co.*] 118 F.Supp. at 207. The record sustains these findings. (*Footnotes omitted*) *Id.* at 400, 76 S.Ct. at 1009.

[24] "The Government stresses the fact that the variation in price between cellophane and other materials demonstrates they are noncompetitive. As these products are all flexible wrapping materials, it seems reasonable to consider, as was done at the trial, their comparative cost to the consumer in terms of square area." *Id.* at 400-01, 76 S.Ct. at 1009-1010.

Cellophance was found to cost two or three times as much as its chief competitor for the flexible wrapping market, but to cost less than several other forms of flexible wrapping. The Court found those differences in cost did not give DuPont monopoly power over prices.

[25] *See* Findings 32 and 33, 92 F.T.C. at 668-9.

[26] Borden's claim of direct evidence contradicting the Commission's findings is insufficient. Borden points to testimony from only two witnesses to support its argument of price responsiveness between fresh lemons and processed lemon juice. One sales manager for a regional distributor stated that he "would be hazarding a guess" that a correlation existed between the lower price of fresh lemons and a decline in sales of his company's product during the same time period. The other witness, the president of a regional distributor, stated that a very high price for lemons will affect the movement of lemon juice in that "a housewife will have the option to buy lemon juice other than fresh lemons." He also testified, however, that no correlation existed between retail fresh lemon prices and retail processed lemon juice prices.

[27] *See* Finding 28, 92 F.T.C. at 683.

[11] Furthermore, the record supports the Commission's finding that ReaLemon is not reasonably interchangeable with fresh lemons. Borden asserts that ReaLemon may be substituted for each and every end use of the juice from fresh lemons. The *Cellophane* test, however, is not merely whether one product can be substituted for the use of another product, but whether products may be reasonably interchanged for the purposes for which they are produced when prices, uses, and qualities of the products are considered.[28] In *Cellophane* the court examined the flexible wrapping market for differences in quality as perceived by buyers of flexible wrapping and the degree to which those differences affected their buying decisions. 351 U.S. at 397-400, 76 S.Ct. at 1008-1009. If the quality differences between two products are such that consumers would not consider one product a viable substitute for another in making their purchasing decisions, regardless of whether one product actually can be substituted for the use of another, then these quality differences must be considered in determining the reasonable interchangeability of the products in a competitive market. The Commission considered the quality differences between fresh lem**[509]**ons and processed lemon juice and found a number of undisputed differences which affect a consumer's purchasing decision. Documents from Borden, market studies, and testimony from numerous distributors showed that conspicuous differences are the greater convenience and storage capabilities of processed lemon juice over fresh lemons. Processed lemon juice is available for immediate use while fresh lemons must be squeezed for the juice. Processed lemon juice may be stored for long periods; ReaLemon may last from six months to a year if refrigerated. In contrast, fresh lemons are perishable, will spoil within a relatively short time, and must be replenished constantly if used frequently. Other quality differences affecting consumer buying decisions concern taste and decorative uses. Borden's marketing plans recognized that, notwithstanding the convenience and economic factors, it would be difficult to convert many consumers of fresh lemons to ReaLemon because of a strong preference for the taste of fresh lemons. A marketing study done for Borden in 1972 concluded on the basis of interviews with consumers that the chief reason consumers

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[28] In *Cellophane*, the court stated that the competitive market for commodities depends on how different they are from one another in character or use, and "how far buyers will go to substitute one commodity for another." 351 U.S. at 393, 76 S.Ct. at 1006. It further noted that "[i]t is the variable characteristics of the different flexible wrappings" and the producers' marketing ability that determine choice. *Id.* at 402, 76 S.Ct. at 1011.

used fresh lemon juice was its superior flavor.[29] Borden's marketing plans also recognized that the presence of chemical additives in ReaLemon distinguished it from fresh lemons. Finally, an obvious difference between fresh lemons and processed lemon juice which affects consumer selection is the ornamental or decorative uses of fresh lemons, such as a lemon wedge for iced tea, a slice of lemon to garnish fish or other dishes, a twist of lemon peel to decorate drinks, and grated lemon peel for recipes. The evidence demonstrated that restaurants commonly use fresh lemons for such purposes, and even consumers of processed lemon juice felt that fresh lemons should be used when entertaining guests. These demonstrated quality differences between fresh lemons and processed lemon juice further support the Commission's finding that, considering price, use and quality, fresh lemons were not reasonably interchangeable with processed lemon juice.

[12, 13] In conjunction with the reasonable interchangeability test of *Cellophane,* the Commission applied the submarket test of *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962),[30] to conclude that processed lemon juice is a valid submarket within which to assess the allegations of the complaint. Borden contends that the Commission erred in applying the *Brown Shoe* test because it relates to relevant markets for Clayton Act anti-merger cases rather than for Sherman Act monopolization cases. Basically Borden maintains that in a proceeding under the more flexible provisions of § 5 of the FTC Act, the Commission may apply only the reasonable interchangeability test of *Cellophane* if the maintenance of unlawful monopoly power is alleged. We reject this contention for two reasons. First, the Commission did not "ignore the dictates of *Cellophone*" and apply exclusively the *Brown Shoe* submarket criteria, as claimed by Borden. On the contrary, the Commission relied on a synthesis of both tests for guidance in determining whether Borden's conduct violated § 5. Second, the Supreme Court has recognized that submarkets, as separate economic entities, may be found in **[510]** Sherman Act cases as well as Clayton Act cases, and there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." *United States v. Grinnell Corp.,* 384 U.S. 563, 573, 86 S.Ct. 1698, 1705, 16 L.Ed.2d 778 (1966). This court has recognized that a submarket analysis may be appropriate in a Sherman Act monopolization case. *Byars v. Bluff City News Co., Inc.,* 609

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[29] *See* Finding 19, 92 F.T.C. at 679, and the many comments from consumers quoted therein.

[30] The Court in *Brown Shoe* explained the definition of a submarket as follows:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes. *United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 593-595 [77 S.Ct. 872, 877-878, 1 L.Ed.2d 1057]. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. (*Footnotes omitted.*) 370 U.S. at 325, 82 S.Ct. at 1523.

F.2d 843, 859, n. 41 (6th Cir. 1979).[31] We hold that the use of submarket criteria is appropriate to define the relevant market in the present case dealing with the unlawful maintenance of monopoly power under § 5 of the FTC Act.[32]

Borden further attacks the relevant product market finding of the Commission on the ground that the Commission erred in excluding from the processed lemon juice market lemonade and a lemon-based mixer for cocktails. In arguing that processed lemon juice contains more than the five products included by the Commission in the relevant product market, *supra*, n. 4, Borden questions the credibility of an economist testifying for the FTC, and claims that numerous other witnesses described the competition between processed lemon juice and lemonade. The testimony relied upon by Borden is inconclusive. As to whether reconstituted lemon juice competes with lemonade, one company representative (Kendall, Kendall Foods) stated that it was a very hard relationship to know, and he "just had a feel for it." Another company representative (Wolcott, Seneca Foods) stated he could speak only from his personal use as a consumer as to whether reconstituted lemon juice competes with lemonade. The opinion of a third company representative (Greenburg, Penn Fruit) was that lemonade competes with reconstituted lemon juice only during the summer months. A fourth representative (Fey, Minute Maid) thought that all lemon-flavored products compete to a certain degree. This contradictory testimony cited by Borden is insufficient to support a conclusion that the Commission's definition of the processed lemon juice market is not supported by substantial evidence.

Furthermore, Borden points to evidence of interchangeability between processed lemon juice and lemonade for only one particular end use, the making of lemonade. It cites no evidence of interchangeability with processed lemon juice for other uses, such as in recipes and iced tea. Similar shortcomings apply to the argument that lemon-based cocktail mixes should be included in the processed lemon juice market. The record viewed as a whole substantially supports the Commission's definition of the processed lemon juice market, and this court concludes that the defined market was appropriate for examining Borden's conduct under § 5.

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[31] *See also Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27 n. 11 (3rd Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978); *Greyhound Computer Corp. v. I.B.M. Corp.*, 559 F.2d 488, 494 n. 7 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978).

[32] *See L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1, 11 (7th Cir. 1971). Apparently Borden does not seriously contest the finding that processed lemon juice is a relevant submarket if the submarket criteria may be applied here, and properly so because substantial evidence supports the Commission's finding that processed lemon juice is a submarket.

In addition to the previously discussed differences in qualities, uses, and prices, the Commission found that industry members recognized the processed lemon juice market as a separate and distinct economic entity. This recognition was reflected in the pricing policies of industry members, their marketing strategies, and the marketing of fresh lemons without regard for the availability of processed lemon juice. Furthermore, there are differences in the production of fresh lemons, which are cleaned and processed as fresh produce, and processed lemon juice, which goes through a manufacturing and bottling process. The channels of distribution are also different, with fresh lemons sold through produce brokers and wholesalers, while processed lemon juice is sold through grocery brokers or salesmen.

VI

[14] Having considered the relevant product market, we now must determine [511] whether substantial evidence supported the Commission's finding that Borden possessed monopoly power within the market. The existence of monopoly power may be inferred from a predominant share of the market. *United States v. Grinnell,* 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). Such an inference, however, "does not have to follow automatically. Only a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists." *Byars v. Bluff City News Co., supra,* 609 F.2d at 850-51. While the Commission stressed Borden's dominant market share, it also relied on several other factors indicating ReaLemon possessed monopoly power within the market.

[15] Borden's market share was substantial at times amounting to almost 90% of the market nationwide, and over 95% in some large metropolitan areas. Much of the statistical data used by the Commission in determining market shares came from Borden's own documents and marketing plans.[33] From 1969 through 1974 Borden's national market share ranged from 88% to 75.3% on a liquid volume basis, and from 91.8% to 88.9% on a dollar basis. Borden's 1971 Marketing Plan for ReaLemon estimated its market share at 92%, the 1972 plan estimated 90%, and the 1973 plan put it at 88%. Although these market shares are more than sufficient to infer monopoly power,[34] the Commission looked to other factors evidencing Borden's power to control prices or exclude competitors in the market.

[16] While maintaining a dominant share of the market for extended periods of time, Borden consistently was able to charge a higher price and reap greater profits for ReaLemon than were others marketing processed lemon juice. The Commission found that Borden charged a premium price, sometimes over 30 per cent more than the price of other brands, even though

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[33] For example, the 1973 ReaLemon Marketing Plan showed the following market shares on a dollar basis:

	Year Ending 12/25/70	Year Ending 12/24/71	7-Months Ending 8/4/72
REALEMON	91.8	91.4	88.0
GOLDEN CROWN	1.4	2.4	5.5
SENECA	2.0	1.5	1.1
SUNKIST	2.1	1.7	1.4
VITA PAKT	.4	.5	.4
TREESWEET	.5	.4	.4
ALL OTHERS	1.8	2.1	3.2
TOTAL	100.0	100.0	100.0

Borden now claims that this statistical data is unreliable and inaccurate, a position obviously inconsistent with its previous reliance upon this data in formulating its strategy and marketing plans for ReaLemon. ReaLemon management used the market share figures of a recognized and well established independent market research organization. Borden's data on its market share was substantially corroborated by market share figures compiled by complaint counsel from data obtained from firms marketing processed lemon juice. *See* Findings 71-76, 92 F.T.C. at 702-07.

[34] Although the ReaLemon market share showed some decline from 1969 through 1974, this decline is not necessarily inconsistent with a finding of monopoly power. *American Tobacco Co. v. United States,* 328 U.S. 781, 794-95, 66 S.Ct. 1125, 1132, 90 L.Ed. 1575 (1946); *Greyhound Computer Corp., supra,* 559 F.2d at 496 n. 18.

no objective differences in quality existed between ReaLemon and any of the other brands of processed lemon juice.[35] ReaLemon's premium price was attributed to successful product differentiation. Witnesses from the industry and grocery business testified that ReaLemon was "almost generic" or "synonymous" with reconstituted lemon juice. Borden maintained this successful product differentiation through extensive advertising: ReaLemon was the only nationally advertised processed lemon juice and was the only significant advertiser in the industry until 1972 when Golden Crown began advertising on a minor scale in selected markets.

A highly successful brand name and product differentiation achieved through extensive advertising over the years, standing [512] alone, does not create a presumption of monopoly power. When a seller possesses an overwhelmingly dominant share of the market, however, and differentiates its product from others through a recognized and extensively advertised brand name, thereby enabling the seller to control prices or unreasonably restrict competition, then monopoly power may be found to exist. Both ReaLemon and its competitors acknowledged ReaLemon's premium price, the need for competitors to price their products low enough to overcome this premium price in order to maintain or increase their market share, and the ability of ReaLemon to preserve its dominant market share through the manipulation of this premium price gap. Through selective promotional allowances Borden could adjust its net wholesale prices to retailers and control price competition at the wholesale level of distribution. The evidence indicated ReaLemon's successfully differentiated brand name, extensive advertising and ability to command a premium price also acted to some degree as a barrier to entry into the processed lemon juice market.[36]

The Commission also considered the rate of return on ReaLemon's assets realized by Borden. The total purchase price for ReaLemon in 1962 was $12,370,514, but its adjusted net worth was $2,767,619. The parties characterized the $9,602,895 difference as a discount of future earnings or as a "goodwill" cost. In computing ReaLemon's rate of return on its assets, the ALJ excluded the $9.6 million, but Borden argues it should be considered as an asset. If excluded, ReaLemon's rate of return ranged from 16.9% to 35.2% during 1968-73, nearly four and one-half times the average rate of return for the food and kindred products industries. If included, its rate of return ranged from 8.1% to 10.2% during the same period, about one and one-half times the rate of return for the food and related products industries. Regardless of how the $9.6 million is characterized, Borden's rate of return on ReaLemon's assets supports rather than contradicts the Commission's finding of monopoly power.

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[35] In the 1972 Marketing Plan, the president of ReaLemon Foods stated that from a technical standpoint, ReaLemon had "no apparent advantage over the juice of any of its competitors. Processed lemon juice is processed lemon juice . . ." Other ReaLemon market plans, actual prices, and market shares support the finding that ReaLemon commanded a premium price for a basically fungible product.

[36] *See* Findings 96-100, 92 F.T.C. 716-18, quoting testimony from economist Dr. Michael Mann and from the presidents of two regional processed lemon juice companies.

A final aspect of Borden's position in the market structure relied on by the Commission was ReaLemon's substantial resource advantage over its competitors. ReaLemon had far greater resources to finance expenditures on advertising,[37] and promotions[38] than did its nearest competitor. It conducted a strong nationwide public relations program and, through other Borden food products, it could participate in tie-in advertising and cross-couponing. The weaker resource bases of ReaLemon's competitors rendered them unable to engage in such activities. Looking to the evidence as a whole, and in particular to the evidence of Borden's market share combined with its brand name strength, we hold that the Commission's finding of monopoly power is well supported by the record.

VII

[17-19] We next review the Commission's finding that Borden restrained competition in violation of § 5 of the FTC Act by unlawfully maintaining its monopoly power. Borden's mere possession of lawfully acquired monopoly power in the processed lemon juice market is not per se unlawful. *Standard Oil Co. v. United States,* 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911). One who possesses monopoly power violates the Sherman Act through "the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell, supra,* 384 **[513]** U.S. at 570-71, 86 S.Ct. at 1703-1704. It is the use of monopoly power to foreclose competition or gain a competitive advantage that is unlawful. *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948). Predatory conduct by one possessing monopoly power, such as below-cost pricing or price discrimination, is generally required to find a violation of the Sherman Act. It is not essential to a finding of monopolization, however, that acts or practices used to maintain monopoly power be in themselves independently unlawful. *United States v. Griffith,* 334 U.S. at 105, 68 S.Ct. at 944; *United States v. Aluminum Co. of America,* 148 F.2d 416, 431-32 (2nd Cir. 1945). Nor is it always necessary to find a specific intent to restrain trade or monopolize, *Griffith, supra,* 334 U.S. at 105, 68 S.Ct. at 944, for a general intent to monopolize is all that is ordinarily required to find a § 2 Sherman Act violation. *Byars v. Bluff City News Co., Inc., supra,* 609 F.2d at 859. The Commission found ReaLemon's marketing strategies, pricing, and promotional practices were predatory in nature and evidenced an intent to maintain its monopoly power unlawfully. These practices included marketing plans implemented to maintain ReaLemon's monopoly power, pricing and promo-

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[37] The Commission found that ReaLemon spent more than $5,000,000 on advertising between 1969 and 1974. ReaLemon's 1972 Marketing Plan projected its 1971 advertising expenditure at $629,100. In comperison advertising by competing brands in that year was almost non-existent.

[38] For example, ReaLemon's promotion budget for 1973 was $2,805,000. *See* Finding 71, 92 F.T.C. at 715.

tional allowances without cost justification in selective geographic areas where Borden faced heavy competition, and sales below cost or at unreasonably low prices with the intent to exclude competitors from the market.

[20] In the present case the record contains direct evidence of Borden's general intent to exercise and maintain its monopoly power. ReaLemon's marketing plans for 1971-74 mapped out the actions to be taken to maintain its market share and restrain competition from the expansion of Golden Crown and other competitors.[19] Golden Crown was the first competitor to challenge seriously ReaLemon's market dominance. As previously mentioned, Golden Crown's initial market gains came from the market shares of other competitors more than from ReaLemon's. It is to be reemphasized that it was when Golden Crown began to show successful encroachment on ReaLemon's market share that ReaLemon began to react, as its 1971 Marketing Plan indicates.

The 1971 plan proposed heavy emphasis upon the ReaLemon brand name through advertising and depended on the strong familiarity with the brand name as a justification for obtaining a higher price. The 1971 plan further proposed to forego price increases planned to offset higher costs, and to sacrifice short-term profits to maintain its market share. ReaLemon also switched its method of granting promotional allowances, nearly doubling promotional allowances in geographic areas where competition existed, such as on the East Coast, while limiting promotional allowances in non-competitive areas. A specific objective of the 1972 Marketing Plan was combatting low-priced competition, and the primary weapons were promotional allowances on a selective geographic basis and increased advertising. The promotional allowances brought about reductions in ReaLemon's regular retail price by 10 cents or more per 32-ounce bottle.

The 1973 Marketing Plan was more explicit in stating ReaLemon's intention to maintain its monopoly power over the processed lemon juice market through exclusionary conduct. A major objective of the **[514]** plan was to raise ReaLemon's market share from an estimated 86.5% nationwide back to 89.0%. This objective was aimed not only at the Golden Crown market share, "but against the share of all brands other than ReaLemon." Again, the main tools for achieving this objective were selective trade deal promotions and substantial advertising, with promotional spending concentrated in heavily competitive markets for the stated purpose of reversing competitive gains. In particular, to combat Golden Crown inroads ReaLemon sought to reduce the price differential through promotional deals.

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[19] Interestingly, Borden attacks the credibility of its own marketing plans and internal documents, contending they are untrustworthy, mere proposals, and not substantial evidence of Borden's actions. This argument might be meritorious if the portion of the marketing plans taken alone and out of context were relied upon as evidence of Borden's intent. *See Tinken Roller Bearing Co. v. F.T.C.*, 299 F.2d 839, 842 (6th Cir.), *cert. denied,* 371 U.S. 861, 83 S.Ct. 118, 9 L.Ed.2d 99 (1962). However, other evidence and testimony corroborated the marketing plans and documents, demonstrating that these plans guided ReaLemon's conduct in the market. Nor were the stated intent and objectives of these plans taken out of context. A major theme running throughout them was Borden's intent to use selective price promotions to restrain and discipline vigorous price competition. Finally, the marketing plans cannot be construed as "puffery" meant to impress superiors, for the president of ReaLemon contributed to the plans and they were used by management to direct company sales.

The last marketing plan relied on by the Commission, the 1974 plan, substantially increased the budget for overall advertisisng and promotional allowances, but only offered increased promotional allowances in the most competitive geographic areas.[40] A stated objective of the plan was to increase ReaLemon's market share in 4 key districts[41] with high per capita lemon juice consumption, where Golden Crown had been most successful. The plan noted that these 4 districts accounted for an estimated 54.7% of Golden Crown's sales for 6 months of 1973. The objective of the plan was to reduce Golden Crown's share from 18% to 14% in 1974, and increase ReaLemon's share from 71% to 75%. These 4 areas were selected because they represented areas of high development of Golden Crown, and the plan stated that decreasing Golden Crown's effectiveness in these markets "may result in significant reduction of expansion leverage." Trade deals in these 4 areas were to be continued at high levels, whereas deals in other areas were to be reduced. In addition to these heavy promotions in selected areas, ReaLemon dropped planned price increases in the markets where Golden Crown was competing, but instituted price increases elsewhere. Testimony from ReaLemon's regional sales manager, and internal documents and correspondence from ReaLemon's regional and national sales managers demonstrated that these marketing plans were vigorously implemented, and their purposes and objectives were exactly as stated.[42]

These marketing plans, internal documents, and conduct conforming to the plans provided direct evidence of ReaLemon's intent not only to maintain its monopoly power in the market, but also to increase its market share, reduce the shares of Golden Crown and other competitors, and stifle any further expansion or competitive efforts by Golden Crown. ReaLemon's tactics and conduct went beyond a simple, healthy competitive response by a monopolist to price competition. Rather, they evidenced a concerted effort to restrict competition unreasonably and maintain its monopoly power.

The price reductions and promotional allowances in selected geographic markets enabled Borden to receive monopoly profits in areas of little competition, and then use these profits to subsidize price reduction in areas of intense competition. As the only nationwide distributor of processed lemon juice enjoying strong brand recognition and premium price profits, Borden was in the unique position of being able to withstand extended periods of reduced prices and promotional allowances in selected geographic markets. Thus, Borden's conduct had the effect of deterring entry and restricting the ability of competitors to expand into other geographic areas. These selective geographic promotions were intended to confine and discipline smaller regional distributors because of their vigorous price competition and cannot be characterized as competition on the merits exempt from the proscriptions of § 5 of the FTC Act.

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[40] These greater promotional allowances were granted in the Northeast despite the fact that evidence indicated ReaLemon's manufacturing costs were greater there. The greater promotional allowances could not be attributed to lower distribution costs.

[41] The four key districts listed in the plan were New York, Philadelphia, Chicago, and Detroit.

[42] *See* quotes from correspondence and reports of ReaLemon's sales managers in Findings 128-30, 92 F.T.C. 729-32.

Another finding by the Commission demonstrating Borden's intent to maintain its monopoly power was that Borden sold **[515]** ReaLemon below cost or at unreasonably low prices in Philadelphia and Buffalo with the effect of injuring competition.[43]

The Commission made reference to the economic definitions of predatory pricing proposed by Professor Richard Posner[44] and Professors Areeda and Turner[45] but did not make a decision as to which rule correctly defines the term. With reference to the Areeda-Turner rule, the Commission said: "It is not necessary to decide whether this is the exclusive, or even the preferred test for predatory pricing . . . . However, the ALJ and the parties both utilized this approach, and we find it a useful one for illuminating the issue."[46]

Like the Commission, we do not find it necessary to decide which of the two rules, Posner's or Areeda-Turner's,[47] should be applied in the present case in determining whether Borden's pricing was predatory.

This case presents the unique situation of a monopolist marketing a product which could command a premium price, giving it significant pricing leverage over its competitors. ReaLemon historically has dominated the processed lemon juice market and has affected competition adversely through selective geographic price promotions and unreasonably low prices. The record supports the Commission's conclusion that Borden intended to continue its domination with the same long term effect of reducing or eliminating competition.

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[43] The sales in Philadelphia were to Acme Markets, the largest supermarket chain in the city with 20% to 28% of the retail grocery market. The sales in Buffalo were to Niagara Frontier Services, owner of the largest volume supermarkets in the area. Due to limited shelf space and the large promotions offered these customers by Borden, the Commission found that the short-term effect was that they were unable to buy from Borden's competitors.

[44] R. Posner, *Antitrust Law: An Economic Perspective*, 188 (1976).

[45] P. Areeda and D. Turner, Antitrust Law, § 715b (1978); *see also* Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).

[46] 92 F.T.C. 799, n. 29.

[47] Reference is made to an article by Profesors Joskow and Klevorick, *A Framework for Analyzing Predatory Policy*, 89 Yale L.J. 213 (1979), proposing a two-tier rule-of-reason approach to determining whether pricing is predatory. They formulate a rule which assesses long-run conditions, for "such an assessment is required because the essence of predatory pricing is the alleged predator's sacrifice of short-run gains for greater long-run gains." *Id* at 217. The first tier would examine the structural characteristics of the market and the market power of the alleged predator to determine if they generate a reasonable expectation that predatory pricing could occur which would impose significant economic losses on society. Among the structural factors Joskow and Klevorick would consider is the following:

> Second, we should seek to determine whether the existing dominant firm has been successful in establishing a significant "brand preference" in the eyes of consumers, not by producing an objectively better product, but by having been first in the market or by having made extensive "image" advertising expenditures. Faced with such a market, an entrant not only may have to invest the resources that are technically required to establish production and distribution networks but also may have to undertake substantial promotional expenditures, both to get its product known and to overcome brand loyalties that the dominant firm has achieved. In such situations, successful entry will be more costly and more time-consuming, and, as a result, potential competition will be a less effective constraint on the existing dominant firm. As a result, courts should recognize that because generic names and premium brand images induced by advertising change the conditions of entry in such a way that potential competition is a less effective constraint on prices than it otherwise might be, dominant firm behavior in such markets may be worthy of closer scrutiny.

In those cases where the firm and market structural characteristics suggested that efficiency losses are likely to be high if there is a failure to identify pricing which is predatory, then the second tier of the analysis would be applied. *Id.* at 249. This second tier would more closely examine a firm's pricing behavior, and would allow for a more flexible approach in applying the various cost-based rules. The Joskow-Klevorick proposal combines some of the advantages of the *per se* cost-based rules in that it is a workable rule which can be applied by the courts, and some of the advantages of flexibility in the broader Scherer and Posner rules. This article was published after the Commission's opinion was issued.

[21] We conclude that when a monopolist, through brand identification or other**[516]**wise, can and does manipulate prices in such a way as to exclude equally efficient competitors by requiring them to sell below their average variable costs, such price manipulation is an unreasonable use of power to maintain the monopolist's market position. The record supports the conclusion that Borden is a monopolist and undertook these actions. Accordingly, the Commission was authorized to hold that these actions violate the Sherman Act § 2 and the FTC Act § 5.

VIII

The final issue raised in Borden's petition concerns the propriety of the Commission's cease and desist order. Borden alleges that the order amounts to an absolute ban against selective price reductions in response to competition, and therefore deprives Borden of the "meeting competition" defense to which it is entitled. Additionally, Borden alleges that the prohibition on sales below cost, or at unreasonably low prices which have the effect of hindering or restraining competition, is too vague and unenforceable. Respondent FTC replies that the order need not provide a "meeting competition" defense under the Robinson-Patman Act where Borden was guilty of monopolizing, for a monopolist may be found to have violated § 2 of the Sherman Act whether or not a Robinson-Patman violation is established. Finally, the FTC responds that the order is as specific as the circumstances permit, and sufficiently clear to avoid raising serious questions as to its meaning and application.[48]

[22] The Commission has wide discretion in determining the kind of order necessary to cope with the unfair practices found. *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 392, 85 S.Ct. 1035, 1046, 13 L.Ed.2d 904 (1965); *F.T.C. v. National Lead Co.*, 352 U.S. 419, 428, 77 S.Ct. 502, 508, 1 L.Ed.2d 438 (1957).[49] Because Congress has placed upon the Commission the primary responsibility for shaping remedies, the courts should not "lightly modify" the Commission's order. *F.T.C. v. Colgate-Palmolive Co., supra,* 380 U.S. at 392, 85 S.Ct. at 1046. The courts should "interfere only where there is no reasonable relation between the remedy and the viola-

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[48] The FTC also argues that Borden failed to object to the remedies before the Commission, and raises these objections for the first time in this Court. It appears that the objections in issue were at least indirectly raised before the Commission, and they have been considered by this Court.

[49] This wide latitude is based on the Commission's "expertise in determining what is necessary to eliminate unfair practices" and its administrative responsibilities to devise remedies according to a consistent statutory policy." *Standard Oil Co. of Cal. v. F.T.C.*, 577 F.2d. 653, 662 (9th Cir. 1978).

tion." *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357, 377, 85 S.Ct. 1498, 1510, 14 L.Ed.2d 443 (1965); *P.F. Collier & Son v. F.T.C.*, 427 F.2d 261, 276 (6th Cir.), *cert. denied*, 400 U.S. 926, 91 S.Ct. 188, 27 L.Ed.2d 186 (1970).

[23] The first paragraph of the Commission's order prohibiting any price discrimination, not justified by cost differentials, in any geographic area that adversely affects competition, is reasonably related to Borden's unlawful conduct which the Commission has sought to curtail. As stated earlier, Borden's selective geographic promotions and price cuts were its primary tools in hindering competition from smaller regional competitors. No other competing processed lemon juice had the broad national base of Borden, or the ability to remain competitive in the face of Borden's sustained price reductions and promotions in a particular market area. The Commission noted the long-run anti-competitive consequences of this conduct to consumers, in that once Borden eliminates the threat of entry from a regional competitor or disciplines a competitor to cease its price competition, Borden may recoup its short-term reduced profits or losses by raising prices back to monopolistic levels. Borden thus would be able to maintain its monopoly power and consumers would be left with a limited selection and high monopoly prices. The Commission's remedy prohibiting these selective geographic price reductions and **[517]** promotions unless cost-justified is a reasonable means of stopping Borden's unlawful conduct.

[24] We disagree with Borden's contention that the order improperly denies it the "meeting competition" defense. Under the order, Borden still may make overall price reductions to meet competition in particular geographic areas. Additionally, it is well established that the Commission "has the authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose." *Arthur Murray Studio of Washington, Inc. v. F.T.C.*, 458 F.2d 622, 625 (5th Cir. 1972). See also *F.T.C. v. National Lead Co., supra*, 352 U.S. at 430, 77 S.Ct. at 509; *American Cyanamid Company, supra*, 363 F.2d at 771; *Sandura Co. v. F.T.C.*, 339 F.2d 847, 861 (6th Cir. 1964). The Commission "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *F.T.C. v. National Lead, supra*, 352 U.S. at 429, 77 S.Ct. at 509. The prohibited goal was Borden's unlawful maintenance of its monopoly power. To permit it to reduce prices in competition with smaller regional sellers while maintaining high monopoly prices and profits elsewhere, would be to permit the very practice used to carry out its unlawful purpose. The FTC had the authority to restrict this practice, even though it might otherwise be lawful.

[25, 26] Finally, Borden alleges the order is so vague as to be unenforceable. Borden focuses solely on the language prohibiting ReaLemon from selling "below its cost or at unreasonably low prices." In this regard, the Supreme Court has said an FTC order must be "sufficiently clear and precise to avoid raising serious questions as to [its] meaning and applica-

tion." *F.T.C. v. Colgate-Palmolive Co., supra,* 380 U.S. at 392, 85 S.Ct. at 1046. When considered in the context of the complaint and opinion from which it arose, the language to which Borden refers is sufficiently clear and precise.[50]

The prohibition against selling "below its cost" refers to selling below ReaLemon's average total cost, and "unreasonably low prices" refers to sales made at or near average costs with the intent to restrain unreasonably competition from Golden Crown and others, as the opinion clearly demonstrates.[51] The Commission explained in the remedy portion of its opinion that "whether a price is 'unreasonably low' must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market."[52] With such knowledge, Borden can determine whether its pricing policies will put it in a zone of danger with respect to the FTC ruling. Accordingly, the onus of compliance is in its proper place.

We affirm and enforce the Commission's order.

CORNELIA G. KENNEDY, *Circuit Judge,* dissenting.

The majority affirms the FTC's ruling that Borden engaged in monopolization in violation of section 2 of the Sherman Antitrust Act. I respectfully dissent.

Although all reconstituted lemon juice is chemically alike, the FTC found that a strong consumer preference existed for Borden's ReaLemon brand because Borden successfully differentiated ReaLemon from other brands in the minds of consumers through heavy promotion of the ReaLemon trademark. *Borden, Inc.,* [1976-1979 Transfer Binder] Trade Reg.Rep. (CCH) ¶ 21,490 at p. 21,496. The FTC found that the consumer preference enabled Borden to **[518]** charge significantly more for ReaLemon than consumers were willing to pay for competing products.[1] *Id.* It also found that Borden had monopoly power in the reconstituted lemon juice market. *Id.* at 21,501-21,503.

ReaLemon faced increased competition in the late 1960's. The FTC found that Borden deliberately set out to defeat this competition, to maintain or increase its market share. *Id.* at 21,504-21,505. In furtherance of this goal Borden promoted the ReaLemon brand even more heavily. The Commission found that Borden also priced ReaLemon at or near its costs. Because of the price premium ReaLemon commanded—created by the consumer preference—Borden's competitors were forced to price their competing products below their own costs. The FTC called this "unreasonably low" pricing. *Id.* at 21,511, together with 21,509-21,510. The Commission found that Borden practiced such unreasonably low pricing only in those markets where competition was stiff.

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[50] Although the order is sufficiently precise, Borden may still take advantage of the Commission's procedures for advising a respondent whether its proposed conduct violates the order. Concern that hypothetical conduct might violate the order is an insufficient reason for modification. *See F.T.C. v. National Lead Co., supra,* 352 U.S. at 431, 77 S.Ct. at 510; *Luria Brothers & Co. v. F.T.C., supra,* 389 F.2d 847, 862 (3rd Cir.), *cert. den.,* 393 U.S. 829, 89 S.Ct. 94, 21 L.Ed.2d 100 (1968).

[51] *See* 92 F.T.C. at 800-01, 804-05.

[52] 92 F.T.C. at 807 n. 41.

[1] The Commission heavily relied on its finding that competitors would have to sell at a price well below that of ReaLemon in order to compete. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,507-21508; 21,510. This finding is a little hard to accept, in view of the fact that one of Borden's most successful competitors, Minute Maid, apparently charged significantly more for its product than Borden did for ReaLemon.

The FTC concluded that under section 2 of the Sherman Act a monopolist may only maintain its power through means that are "economically inevitable." *Id.* at 21,504, 21,508, 21,510. It ruled that Borden's selective unreasonably low pricing in a deliberate attempt to maintain or increase its market share constituted monopolization under section 2, and thereby violated section 5 of the FTC Act. *Id.* at 21,510. The majority upholds this ruling. In addition to the grounds relied on by the Commission, the majority relies on alleged below cost sales by Borden and states that Borden used its monopoly profits in markets where it faced little competition to subsidize price reductions in markets where the competition was stiff. Majority op. at 514. One cannot tell from the majority's opinion the relative importance of any one of these grounds for its holding.

Although it upholds the Commission's result the majority does not adopt the Commission's definition of monopolization as competitive conduct by a monopolist that is not "economically inevitable." Rather, as the majority recognizes, the otherwise lawful conduct forbidden by section 2 of the Sherman Act is a monopolist's use of *monopoly* power in order to maintain or improve its position in the market. *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948); *Telex Corp. v. International Business Machines Corp.,* 510 F.2d 894, 926-927 (10th Cir.), *cert. dismissed,* 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975); majority op. at 512-513 (emphasis added). Not every exercise of market power by a monopolist is a use of monopoly power. Monopoly power is power that a firm possesses by virtue of its monopoly position in the market, not power that it has because of, for instance a superior product. A use of monopoly power that is unreasonably anti-competitive violates the Sherman Act. *See Byars v. Bluff City News Co.,* 609 F.2d 843, 853 (6th Cir. 1979). However, growth or development as a consequence of a superior product, business acumen, or historic accident, even by a monopolist, does not violate the Act. *United States v. Grinnell,* 384 U.S. 563, 570-571, 86 S.Ct. 1698, 1703-1704, 16 L.Ed.2d 778 (1966).

Since monopolization is the unreasonably anti-competitive use of monopoly power, the only intent that could be relevant to a charge of monopolization is an intent to use monopoly power in an unreasonably anti-competitive manner. There is no proof that Borden had such an intent here. Borden surely meant to obtain as much of the reconstituted lemon juice market as it could, but that is the very essence of normal competition, a goal that we approve even for a monopolist. Despite the majority's assertion to the contrary this *is* simple, healthy competition. The alternative is that Borden must have intended not to respond when its market share began to disappear, **[519]** but not even a monopolist need act so irrationally. *See Telex v. IBM, supra.*

Borden meant to accomplish its marketing goals through extensive advertising and promotions. Advertising is not a use of monopoly power. Successfully promoting one's product is the epitome of the "business acumen" that *Grinnell* states is *not* monopolization. Nor is any monopolization shown by Borden's selective price reductions where there is no finding that the discriminatory pricing violated the Robinson-Patman Act or resulted in Borden's not making a profit. It is simply good business practice, not a use of monopoly power, to lower prices only where the competition is stiff. *See California Computer Products v. International Business Machines Corp.*, 613 F.2d 727, 742-743 (9th Cir. 1979) ("business acumen" includes shrewdness in profitable price competition, which is pricing above average variable cost; the Sherman Act does not distinguish competition on the basis of price and of performance).

The use of monopoly profits derived in one market to subsidize competition in another market, on the other hand, is an unreasonably anticompetitive use of monopoly power. Had the Commission rested its decision here on a finding that Borden used its monopoly profits from some geographic markets to finance the fight against competition in others, there was evidence which might have supported such a Commission decision. However, the FTC found Borden in violation of section 2 because it charged "unreasonably low" prices, and it defined unreasonably low prices as prices so low that the preference for ReaLemon forced competitors to sell at a loss. The Commission expressly stated that a monopolist with an image advantage may not cut prices to eliminate competitors, thus requiring Borden to engage in umbrella pricing, or pricing above cost to protect competitors.[2] The Commission did not ground its decision on any below cost pricing or improper use of monopoly profits.[3] Borden's forcing its **[520]** competitors to sell at a loss was certainly the paramount if not the only basis for the Commission's decision, and it is the basis the Commission gives for its decision that we must review on appeal. *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); majority op. at 506-507. Accordingly, any discussion of below cost sales or use of monopoly profits to subsidize low prices has no place in our review of the case.

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[2] The Commission adopted the analysis of Professor Scherer, who "find[s] it hard to avoid a value judgment that temporary price cutting to eliminate producers handicapped only by an inferior brand image is socially undesirable." Scherer, "Predatory Pricing and the Sherman Act: A Comment," 89 Harv.L.Rev. 869, 889 (1976). [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,509. This is indeed a value judgment, and it has nothing to do with the "use of monopoly power" that section 2 reaches. Whether I agree or disagree with Professor Scherer's value judgment, it has no place here. Despite a rather general assumption to the contrary, section 2 of the Sherman Act is not a license for the court or the FTC to choose among competing economic theories of the social good and to impose their own ideas of wise economic policy. That is the task of Congress, or arguably the FTC acting as a rule maker under the FTC Act. While broad, the definition of monopolization in section 2 is not quite that broad.

[3] The FTC did note that Borden "apparently" made some sales of ReaLemon at prices that were below its average total costs, after agreeing with the ALJ that Borden did not price ReaLemon below average *variable* cost [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,507. Professors Areeda and Turner would find a monopolist that prices its products above average variable cost not guilty of monopolization. Ageeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 Harv.L.Rev. 697 (1975). Professor Posner would instead find a violation of the Sherman Act when a monopolist sells below average total cost. Posner, *Antitrust Law: An Economic Perspective* 188 (1976). The FTC expressly refused to decide whether Posner or Areeda/Turner correctly defined those pricing practices that constitute monopolization. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,506 n. 29. This is understandable since the Commission was concerned with manipulation of a price premium, not below cost pricing.

Absent a decision by the Commission that pricing below average total cost violates section 2 of the Sherman Act, the fact that Borden might have engaged in such pricing has no relevance to this case except, as the Commission used it, to show that Borden's prices were low. This Court, cannot take judicial notice that Posner's and not some other economic theory correctly defines the use of monopoly power. In fact, the majority expressly refuses to make such a finding. Thus, the existence of pricing below average total cost does not support the majority's decision.

(footnote continued)

On the merits of the decision the FTC did make, neither the majority nor the FTC ever explain why a monopolist may not use consumer preference to its competitive advantage or how this is a use of monopoly power. The majority simply asserts, as did the Commission, that Borden's manipulation of its price premium harmed competition. However, it is the *use* of *monopoly* power, not just an effect on competition or competitive activity by a monopolist, that section 2 prohibits.

The price premium did not exist because of the monopoly. It was nothing more than evidence of a consumer preference for ReaLemon. The preference was created in part by the ReaLemon trademark and in part by successful advertising. The trademark was lawfully acquired by Borden and is protected by federal law. 15 U.S.C. § 1114. Manipulation of a consumer preference is not a use of monopoly power unless the preference was created somehow by the monopoly position in the market, and there is no such finding here. *But, see* Scherer, "The Posnerian Harvest: Separating Wheat from Chaff," 86 Yale L.J. 974, 998 (1977).[4] It is not a violation of the antitrust laws for a monopolist to take advantage of a consumer preference at the expense of its competitors.[5]

The majority may be reasoning that the lawful conduct forbidden by section 2 of the Sherman Act extends beyond a monopolist's unreasonable use of monopoly power to include the use of any market power. The ma-

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(footnote continued from previous page)

The Commission also stated parenthetically that Borden subsidized its price cuts in part with continued monopoly pricing elsewhere. *Id.* at 21,508. This statement was made as an aside during the Commission's discussion of Borden's manipulation of its price premium. The statement would only be true if Posner's definition of predatory pricing were adopted. Since the Commission did not decide that Posner correctly defined pricing that constitutes a use of monopoly power there is no support for its statement that Borden used its monopoly profits to subsidize the fight against competition. The Commission's offhand statement cannot be the basis for a finding of monopolization

[4] The majority cites with approval Joskow and Klevorick, "A Framework for Analyzing Predatory Policy," 89 Yale L.J. 213 (1979). Like Professor Scherer, these commentators would subject the competitive use of an irrational price premium to scrutiny under section 2. Again, like Professor Scherer, their reasons for doing so focus solely on the effect of such a brand preference on competition. As set out below, n. 5, I do not believe that it is the function of the FTC to decide which consumer preferences are "rational" and which "irrational." However, the fatal flaw I see in Joskow and Klevorick's analysis is that it ignores the complete legitimacy of a brand preference created by advertising or by being first in the market. This is "business acumen," and its use to affect competition is not forbidden by section 2 of the Sherman Act.

[5] The FTC disapproved of the consumer preference for ReaLemon because it resulted from a "spurious" product differentiation based on the strength of the ReaLemon trademark. [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) at 21,509-21,510. The FTC concluded that there was no rational reason for consumers to pay a premium for the ReaLemon brand name since the product is chemically indistinguishable from other brands of reconstituted lemon juice. *Id.* at 21,508, 21,510. I strongly disagree. The primary function of a brand name is to provide consumers an assurance of quality. It is quite rational for consumers to pay extra for ReaLemon to minimize their risk of receiving inferior goods. Should any proof that this is rational be necessary this case provides a prime example. Borden's principal competitor and the complaining party before the Commission was Golden Crown. The ALJ found and the Commission appears to agree that Golden Crown sold an adulterated product. *Id.* at 21,501 n. 16.

jority opinion is a little ambiguous on this point. If this is the basis of its decision, I think the majority errs in extending the Sherman Act to the otherwise lawful use of market power that is not monopoly power. However, even under this broader test, there is nothing unreasonable about a monopolist's using its image advantage to its benefit.

Because I think the FTC was wrong to premise a violation of section 2 on Borden's [521] manipulation of its price premium, I would not affirm its decision. I would remand instead for the FTC to decide whether Borden did use monopoly profits from some markets to subsidize competition in other markets.

FEDERAL TRADE COMMISSION
v.
H.N. SINGER, INC., et al. and MICHAEL QUINLAN and JAMES EARL WEIHOFF*

Nos. 80-4508, 81-4119 FTC File No. 802 3147

United States Court of Appeals, Ninth Circuit
February 26, 1982

1. **Where injunction indicated that court had considered the record and concluded that FTC was likely to prevail on the merits, and where immediate irreparable harm would occur absent preliminary relief, explicit findings of fact were not necessary for appellate review of preliminary injunction and order modifying it.**

Explicit findings of fact were not necessary for meaningful appellate review of preliminary injunction and order modifying it, where injunction made it clear that court had considered pleadings, memoranda and affidavits and had concluded that Federal Trade Commission was likely to prevail on merits and that in absence of preliminary relief immediate and irreparable harm would occur.

2. **Even where administrative proceedings are not contemplated, FTCA authorizes agency to seek, and district court to grant, permanent injunctions in appropriate cases.**

Federal Trade Commission Act gives FTC authority to seek, and district court authority to grant, permanent injunctions in proper cases, even though FTC does not contemplate any administrative proceedings.

3. **Even though FTC does not contemplate administrative proceedings, a routine fraud case is a proper case in which agency may seek, and district court grant a permanent injunction.**

Routine fraud case is proper case in which Federal Trade Commission has authority to seek, and district court authority to grant, permanent injunction, even though FTC does not contemplate any administrative proceedings.

4. **Granting preliminary injunctions to enjoin violations of law enforced by FTC is within district court's authority.**

District court has authority to grant preliminary injunctions to enjoin acts or practices that violate law enforced by Federal Trade Commission.

5. **In order to protect possibility of equitable remedy of rescission, district court is empowered to issue preliminary injunction to preserve status quo.**

District court has power to issue preliminary injunction to preserve status quo in order to protect possibility of equitable remedy of rescission.

6. **FTCA empowers court to issue preliminary injunction freezing defendants' assets as an appropriate provisional remedy to final relief of rescission, and as ancillary relief required to effect complete justice for violations of franchise rules.**

In action by Federal Trade Commission alleging violations of its trade regulation rule and Federal Trade Commission Act, district court had authority to issue orders freezing defendants' assets by preliminary injunction, as appropriate provisional remedy to final relief of rescission for violation of franchise rules, and as ancillary relief necessary to accomplish complete justice under Federal Trade Commission Act.

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*Reported in 668 F.2d 1107 (1982).

7. **FTCA empowers court to issue rescission of contracts or any other ancillary relief necessary to effect complete justice.**

District court has authority under Federal Trade Commission Act, to grant any ancillary relief necessary to accomplish complete justice, and, in particular, power to order rescission of contracts.

8. **Defendant must show that producing a particular document may, by authenticating it, have incriminated him; but mere possibility that the act of producing required documents created by third parties could amount to authenticating them and thus be compelled self-incrimination did not provide grounds for holding order void, or invalidate provision requiring production of third party documents.**

Provision of preliminary injunction requiring defendants to produce documents created by third parties was valid, and possibility that act of producing documents in response to order could amount to authenticating them, and thus be compelled self-incrimination was not valid grounds for holding order void; rather, defendant was required to make showing that his producing it may, by authenticating it, have incriminated him.

In action initiated by Federal Trade Commission, the United States District Court for the Northern District of California, Robert F. Peckham, Chief Judge, granted preliminary injunction, from which two defendants appealed, and modified injunction, from which same defendants appealed. The Court of Appeals, Duniway, Circuit Judge, held that (1) explicit findings of fact were not necessary for mean**[1108]**ingful appellate review; (2) FTC had authority to seek, and district court authority to grant, preliminary injunction; (3) district court had authority to issue orders freezing defendants' assets; (4) provision of preliminary injunction requiring defendants to produce documents created by third parties was valid, and possibility that act of producing documents in response to order could amount to authenticating them, and thus be compelled self-incrimination, was not valid grounds for holding order void.

Affirmed.

(Syllabus, with substituted captions, taken from 668 F.2d 1107)

Jeremiah Casselman, Los Angeles, Cal., for defendants-appellants.

Laurence O. Masson, San Francisco, Cal., *Edward F. Glynn, Jr.,* Atty., F.T.C., Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California. **[1109]**

Before DUNIWAY and FERGUSON, *Circuit Judges,* and HOFFMAN,* *District Judge.*

DUNIWAY, *Circuit Judge:*

Defendants appeal from a preliminary injunction and from an order modifying it. We affirm.

I. *The Nature of the Case.*

In its complaint, filed in the district court, the Federal Trade Commission alleged violations of its trade regulation rule "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. Part 436 (The Franchise Rule), and sought redress for third parties under Section 19 of the Federal Trade Commission Act, 15 U.S.C. § 57b(a)(1) and (b). It also alleged false promises and false and misleading representations contrary to Section 5(a) of the Act, 15 U.S.C. § 45(a), and sought a permanent injunction under Section 13(b) of the Act, 15 U.S.C. § 53(b) and refunds for third parties as a form of relief ancillary to that equitable relief.

The Commission asked for a preliminary injunction against further violations of the Franchise Rule, freezing the defendants' assets (except for "ordinary business and living expenses") pending a trial on the merits, and requiring an accounting of assets acquired by the defendants as a result of the defendants' activities. The preliminary injunction was sought in accordance with the procedures of F.R.Civ.P. 65(a) and on the authority of both § 13(b) and § 19. The district judge granted a preliminary injunction in terms somewhat different from those requested. Two individual defendants, Quinlan and Weihoff, appeal. That is our number 80-4508. They also asked the district court to modify its order on the ground that the requirement that they provide an accounting was a violation of their privilege against self-incrimination guaranted by the Fifth Amendment to the United States Constitution. The district court agreed and amended its order so that the defendants were required to file only "all current accountants' reports, bank statements, documents indicating title to real or personal property, and other indicia of ownership or interest in property of any of the defendants. . . ." The same defendants appeal from the order modifying the injunction. That is our number 81-4119.

The alleged violations of the law by the defendants arose from the sale of franchises for "Hot Box Products." Franchisees were to distribute frozen pizzas and ovens to retail outlets. They paid substantial amounts for the franchises. The details of the fraud need not concern us. The appellants do not challenge the sufficiency of the evidence to support preliminary injunctive relief against them.

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*The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

II. *The Form of the Preliminary Injunction.*

[1] The appellants argue that the injunction should be vacated because the district judge failed to make findings of facts as is required by F.R.Civ.P. 52. But the injunction made it clear that the court had considered the pleadings, memoranda and affidavits and had concluded that the Commission was likely to prevail upon the merits and that in the absence of preliminary relief immediate and irreparable harm would occur. In this case explicit findings of fact were not necessary for meaningful appellate review. *See Magna Weld Sales Co. v. Magna Alloys & Research Pty.*, 9 Cir., 1976, 545 F.2d 668.

III. *The Power To Issue a Preliminary Injunction.*

Rule 65 concerns the procedure for issuing a preliminary injunction. The substantive basis and the jurisdictional authority for use of this procedure must be sought elsewhere. 7—Pt. 2 Moore's Federal Practice ¶ 65.03[1]. There are two bases for jurisdiction to issue the preliminary injunction. One is Section 19 of the Act, 15 U.S.C. § 57b(a)(1) and (b): **[1110]**

> (a)(1) If any person, . . . violates any rule under this chapter respecting unfair or deceptive acts or practices . . . then the Commission may commence a civil action against such person, . . . for relief under subsection (b) of this section in a United States district court . . . .
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> * * * * * * *
>
> Nature of relief available
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> (b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

It is clear that under this section a district court has jurisdiction to issue a preliminary injunction.

The second legal basis is Section 13(b) of the Act, 15 U.S.C. § 53(b):

> Temporary restraining orders; preliminary injunctions
>
> (b) Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect; *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

The Commission argues that the second proviso gives it the power to seek an injunction in the district court in proper cases without also initiating administrative proceedings. The appellants disagree. They read the clause as granting the Commission the power to seek permanent injunctions only under the conditions laid down earlier in the section for the issuance of preliminary injunctions. We agree with the Commission. The proviso in question does not on its face condition the issuance of permanent injunction upon the initiation of administrative proceedings.

What little legislative history there is supports our conclusion. Section 13(b) was enacted as part of the Trans-Alaska Pipeline Act, P.L. 93-153, but was originally a part of the Senate bill for the Federal Trade Improvement Act of 1973, P.L. 93-637. In the Senate Report on that bill the intent of the final clause of § 13(b) was explained:

> This section would permit the Commission to obtain either a preliminary or permanent injunction through court procedures initiated by its own attorneys against any act or practice which is unfair or deceptive to a consumer, and thus [1111] prohibited by section 5 of the Federal Trade Commission Act. The purpose of section 210 is to permit the Commission to bring an immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded.
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> Section 210 authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final within the meaning of section 5. The test the Commission would have to meet in order to secure this injunctive relief is similar to the test it must already meet when attempting to secure an injunction against false advertising of food, drugs, devices, or cosmetics. (See 15 U.S.C. 53(a)).
>
> Provision is also made in section 210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a [sic] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order. Commission resources will be better utilized, and cases can be disposed of more efficiently.

S.Rep. 93-151, 30-31. This report sets out a clear and coherent policy underlying the new section and supports the natural reading of the statute.

[2, 3] It is true that the power given to the Commission in the second proviso has rarely been used. We have found only one case where the Commission has sought an injunction in a district court under this section. It was granted. *FTC v. Virginia Homes Manufacturing Co.*, D.Md., 1981, 509 F.Supp. 51. That court described as obfuscatory the argument that the Commission lacked the power because it had never previously attempted to use it. *Id.* at 53 n.1. We agree. We hold that § 13(b) gives the Commission the authority to seek, and gives the district court the authority to grant, permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings. We hold further that a routine fraud case is a proper case. We further hold that this present case is a routine fraud case and a proper case for the use of this authority.

[4] It is clear that, because the district court has the power to issue a permanent injunction to enjoin acts or practices that violate the law enforced by the Commission, it also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards and are sought in accordance with Rule 65(a). *See Porter v. Warner Holding Co.*, 1946, 328 U.S. 395, 397-398, 66 S.Ct. 1086, 1088-1089, 90 L.Ed. 1332.

IV. *The Power To Freeze Assets*

The appellants do not object to that part of the preliminary injunction that prevents them from further violating the Franchise Rule. They do object to the orders that freeze their assets. The order directed to all defendants reads:

> [They are restrained and enjoined]
>
> 2. From directly or indirectly, transferring, liquidating, encumbering, pledging, assigning, or otherwise disposing of any property of Singer, or of any of their personal assets or property (except for ordinary living expenses) unless allowed by further order of this Court;

There is also an order directed to appellant Weihoff to prevent him from disposing of **[1112]** or encumbering a particular parcel of real property, and a similar order directed to appellant Quinlan. Finally there is an order directed to all banks, savings and loan institutions and brokerage houses preventing them from disposing of the defendants' assets and from allowing any withdrawals from their accounts. It does not contain an exception for "ordinary living expenses."

While the details of these orders might be open to challenge and the appellants could have sought clarification or alteration of them, they did not do so. Instead, they challenge the authority of the district court to issue any such order.

[5, 6] The appellants argue that the asset freeze is in effect a pre-judgment attachment of their assets for the purpose of securing post-judgment recovery, but that it does not meet the requirement of F.R.Civ.P. 64. That rule requires that attachment be in accordance with state law. The argument fails. Rescission is an old equitable remedy and the district court has power to issue a preliminary injunction to preserve the status quo in order to protect the possibility of that equitable remedy. While it is true that the asset freeze has an effect comparable to that of an attachment, it is not an attachment. The fact that the conditions for attachment, normally a remedy in actions at law, might not be met does not imply that another and equitable provisional remedy is not available. *See Hamilton v. MacDonald*, 9 Cir., 1974, 503 F.2d 1138, 1149 n.17.

Because the authority to issue a preliminary injunction rests upon the authority to give final relief, the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy. The Commission says that the preliminary injunction is necessary to preserve the possibility of rescission of contracts and restitution of money obtained by fraud. Rescission is a possible remedy for violation of the Franchise Rule under § 19. Hence, there is a basis for the order freezing assets.

The Commission also relies upon § 13(b). It argues that, because that section gives the court authority to grant a permanent injunction, it also by implication gives the court authority to afford all necessary ancillary relief, including rescission of contracts and restitution. The power to enjoin is part of what used to be the jurisdiction of equity.

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. *Virginian R. Co. v. System Federation*, 300 U.S. 515, 552 [57 S.Ct. 592, 601, 81 L.Ed. 789]. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 [64 S.Ct. 587, 592, 88 L.Ed. 754].
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> * * * * * * *
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> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown v. Swann*, 10 Pet. 497, 503 [9 L.Ed. 508]. *See also Hecht Co. v. Bowles, supra* 330 [64 S.Ct. 592].

Porter v. Warner Holding Co., 1946, 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332. *See also Mitchell v. Robert De Mario Jewelry, Inc.*, 1960, 361 U.S. 288, 291-292, 80 S.Ct. 332, 334-335, 4 L.Ed.2d 323. As we said in *Los Angeles Trust Deed and Mortgage Exchange v. SEC*, 9 Cir., 1960, 285 F.2d 162, 182, "Congress must be taken to have acted cognizant of the historic power **[1113]** of equity to provide complete relief in the light of statutory purposes." *See also SEC v. Wencke,* 9 Cir., 1980, 622 F.2d 1363, 1369.

[7] Appellants argue that Congress in § 19 explicitly granted the district court power to award rescission and other forms of redress only when a Commission rule had been violated, and thus implicitly restricted the remedy for other violations of the Act to agency processes and to the injunctive relief provided in § 13(b). However, §19(e) provides: "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." Thus, there is no necessary or inescapable inference, or, indeed, any inference, that Congress intended to restrict the broad equitable jurisdiction apparently granted to the district court by § 13(b). We hold that Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference. In particular, Congress thereby gave the district court power to order rescission of contracts. Hence § 13(b) provides a basis for an order freezing assets.

In this court, the appellants do not argue that the facts do not support the freeze order. They do not protest the particular details of the order. They stand upon their argument that the court lacked the power to issue it. That position, we reject. There is little authority on the question. *United States v. Coca-Cola Bottling Co.,* 9 Cir., 1978, 575 F.2d 222, involved a somewhat comparable order. But in that case the power to issue it was not directly attacked; our decision turned on whether, in that case, which involved violation of § 7 of the Clayton Act, 15 U.S.C.§ 18, rescission was an available remedy.

In *SEC v. Manor Nursing Centers, Inc.,* 2 Cir., 1972, 458 F.2d 1082, 1105-1106, a freeze order was upheld. While that case arose under § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a), and § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, it is closely analogous to this one. There, as here, an objective of the Commission was to obtain restitution of moneys fraudulently obtained.

We agree with the statement in the opinion of that case:

> that the decision to order a temporary freeze on defendants' assets as ancillary relief in an SEC enforcement action requires particularly careful consideration by the district court. One of the chief reasons for requiring defendants to refund illegally obtained proceeds of a public offering is to compensate defrauded investors. To effect this purpose there may be circumstances where a district court should temporarily freeze defendants' assets to insure that they will be available to compensate public investors. Freezing assets under certain circumstances, however, might thwart the goal of compensating investors if the freeze were to cause such disruption

> of defendants' business affairs that they would be financially destroyed. Thus, the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief.

Here, there is no danger that the freeze will disrupt the defendants' business affairs, to the detriment of those whom the defendants have defrauded. They are out of business, and their activities, as shown in the record, lead to the conclusion that, absent a freeze, they would either dispose of, or conceal, or send abroad, all of the moneys that they have obtained from their victims. *See also International Controls Corp. v. Vesco*, 2 Cir., 1974, 490 F.2d 1334, 1351.

We hold that the court had the power to make the freeze order. We do not pass upon the validity of all of its terms, because that question is not before us. **[1114]**

V. *The Power To Compel Production of Documents and the Fifth Amendment.*

The court's preliminary injunction contained the following:

> ORDERED, that defendants Singer, Luks, Quinlan and Weihoff shall each file, with counsel for the Federal Trade Commission within twenty days of the issuance of this order, an accounting of all property, real of [sic] personal, wherever located whether domestic or foreign, which they own, directly or indirectly, in whole or in part, or otherwise have an interest in, . . .

In their motion to modify the injunction, appellants argued that this provision required them to incriminate themselves. The judge agreed, and modified the provision to read:

> ORDERED, that defendants Singer, Luks, Quinlan, and Weihoff, and each of them, shall file, within twenty days of the issuance of this order, all current accountants' reports, bank statements, documents indicating title to real or personal property, and other indicia of ownership or interest in property of any of the defendants, which indicia of ownership or interest are now in any of the aforenamed defendants actual or constructive possession.

[8] The Commission construes this provision as referring to documents created by third parties. We also so construe it. As so construed, the order is valid. The judge cited *Fisher v. United States,* 1976, 425 U.S. 391, 410, n.11, 96 S.Ct. 1569, 1580 n.11, 48 L.Ed.2d 39, which deals with an order requiring production of such documents, and upholds the order.

Appellants argue, however, that the act of producing documents in response to the order may amount to authenticating them, and thus be compelled self-incrimination. In this case of particular documents, that might be so. But that possibility is not a valid ground for holding that the order is void. *See Fisher, supra,* 425 U.S. at 411-413, 96 S.Ct. at 1581-1582 and n.13. Clearly under *Fisher,* production under compulsion of the order may or may not amount to authentication, and, if it does, would not necessarily be a violation of the Fifth Amendment.

If, as to a particular document, an appellant believes that his producing it may, by authenticating it, incriminate him, he must make a showing to that effect, so that the court can evaluate it. He cannot simply refuse to comply with the order at all. *See Davis v. Fendler*, 9 Cir., 1981, 650 F.2d 1154, 1155, 1159-1160.

The orders appealed from are affirmed.

CONOCO, INC.
v.
FEDERAL TRADE COMMISSION*

Civ. A. No. H-80-921 FTC File No. 81-7-020

United States District Court, Southern District of Texas
March 5, 1982

On cross motions for summary judgment in an FOIA action, court granted FTC's motion for summary judgment, holding that its *in camera* examination of fourteen documents, sought by plaintiff as containing statements of and reasons for Commission policy in the oil and gas acquisition area indicated that they were exempt from FOIA disclosure.

Before NORMAN W. BLACK, *District Judge:*

ORDER

Pending before the Court in this Freedom of Information Act case are cross motions for summary judgment.

Plaintiff is seeking Federal Trade Commission documents containing statements of and reasons for Commission policy in the oil and gas acquisition area; particularly with respect to the Commission's lack of opposition to Mobil Oil Corporation's acquisition of the General Crude Oil Company from the International Paper Company. The Defendant has repeatedly maintained that there are no documents which would be responsive to Plaintiff's request. In the alternative, and without specifically urging them, the Defendant has suggested that the requested documents fall within one or more of the exemptions to the Freedom of Information Act, particularly 5 U.S.C. § 552(b)(5) and/or 5 U.S.C. § 552(b)(3).

The Government has supplied an index of all of the documents in the Commission's Mobil Corp./General Crude file. The Plaintiff has identified fourteen documents from the index which it believes are responsive to its request, while not falling within an exemption to the Act. Those fourteen documents are the subject of Plaintiff's motion for summary judgment.

This Court is mindful that the purpose of the Freedom of Information Act is to encourage full agency disclosure. Absent an exemption virtually every document generated by an agency is available to the public in one form or another. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 44 L.Ed.2d 29, 95 S.Ct. 1504 (1975). The Court has, therefore, examined the fourteen documents *in camera*. Their contents may be summarized as follows:

DOCUMENT I.A. This is apparently an office memorandum; from Daniel S. Koch, a staff attorney, to Henry Lipsky, a liaison officer. The form is dated March 26, 1979; it contains a preliminary information request addressed to the Department of Justice respecting the Mobil Oil/General Crude acquisition. There is a stamp dated March 30, 1979, bearing the legend "No objection by Department of Justice."

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*Not otherwise reported.

DOCUMENT I.B. Memorandum from Henry I. Lipsky to Daniel S. Koch bearing the date March 30, 1979. There are two sentences. The first indicates that the Justice Department has no objection to the proposed investigation. The second sentence directs the staff attorney to attach the memorandum and accompanying office memorandum to a Preliminary Investigation form.

DOCUMENT I.F. Memorandum from Carol M. Thomas addressed to the Director, Bureau of Competition, and several others. In one page it summarizes the early procedural status of the general crude investigation.

DOCUMENT II.A.2. A memorandum from Rendall A. Davis, Jr. to Michael A. Schlanger, in five pages. The memorandum examines the "maximum potential" of the case in terms of the potential economic impact the proposed merger would have. A "worst case" hypothetical is set up and an analysis of same is offered. The memo concludes with a caveat that further investigation is necessary.

DOCUMENT II.A.21. Memorandum from David W. Long, a Commission attorney, directed to the file. Identifies a tentative theory for challenging the Mobil acquisition and describes a geographic impact area. Also identifies possible evidentiary areas to investigate and potential sources of information.

DOCUMENT II.A.35. A transmittal slip from Henry I. Lipsky to Michael A. Schlanger. Directs the Pre-merger Notification and Report Form Summary to the Merger Screening Committee for its information. The Summary is a pre-printed form detailing particulars of the proposed merger.

DOCUMENT II.A.53. An undated, unsigned, handwritten note, lists ten potential subjects for investigation.

DOCUMENT II.A.55. A six page memorandum from James S. Kurz to Dave Long addressing the Mobil/General Crude merger. It summarizes the history of the merger, the status of the parties vis a vis the market and discusses a number of theories under which the Commission might proceed to challenge the merger. Also summarizes possible sources of investigatory data.

DOCUMENT II.A.66. & II.B.65. A three page memo (with 3 page attachment) from Scott Harvey to Dave Long entitled "Thoughts on Mobil/General Crude." It discusses the market impact of the merger and the effect of OPEC. The attachment is an excerpt from a previous memorandum concerning the effects of OPEC on another merger.

DOCUMENT II.B.27. Memorandum from David Long to Michael A. Schlanger, dated June 19, 1979, which summarizes five areas of activity in the Mobil/General Crude investigation.

DOCUMENT II.B.40. Another status report on Mobil/General Crude, dated June 6, 1979. It indicates the focus of the investigation, details activities pursued in furtherance of investigation, comments on the chances of success and requests the services of an economist and another attorney.

DOCUMENT II.K. Six interview reports with individuals tied to the investigation, e.g., corporate officials; and an employee of the U.S. Geological Survey. Conducted by Rendell Davis, a staff attorney and/or David Long.

DOCUMENT II.L.1. Unsigned, undated, handwritten notes. Apparently a personal record of hearing conducted pursuant to subpoena.

DOCUMENT II.L.2. Transcript of hearing conducted on July 20, 1979, which is subject of Document II.L.2. Contains responses of corporate official of Bodcaw Co. to questions posed by a Commission attorney.

None of the documents described above contain statements of Commission policy, nor do they explain the rationale for the Commission's decision not to oppose the merger. In addition, all of the documents antedate the Commission's notice that it would not voice any opposition. With the exception of Document II.L.2. they fall within the ambit of exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), i.e., the documents do not reveal the final reasoning of the Commission in promulgating *its* decision. *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 44 L.Ed.2d 57, 95 S.Ct. 1491 (1975). "The public is only marginally concerned with reasons supporting a [decision] which an agency has rejected, or with reasons which might have supplied but did not supply the basis for a [decision] which was actually adopted on a different ground." *Renegotiation Board, id.* at 186, quoting *NLRB v. Sears, Roebuck & Co., supra.* Since the purpose of the interagency or intra-agency exemption is to protect the consultive functions of government, *Cooper v. Department of Navy of United States*, 558 F.2d 274, 276 (5th Cir. 1977), it is apparent that the first thirteen documents need not be released.

As to Document II.L.2., the transcript manifestly records a hearing conducted pursuant to a Commission subpoena. As such it is protected by the exemption of 5 U.S.C. § 522(b)(3), pursuant to 15 U.S.C. § 57b-2(f).

Accordingly, Defendants' motion for summary judgment is GRANTED, while Plaintiff's is similarly DENIED.

DOCUMENT II.1.[illegible] [illegible]

DOCUMENT II.1.7. [illegible]

Some of the [illegible] described above [illegible] not to oppose the merger. In addition, all of the documents [illegible]

[illegible]

FEDERAL TRADE COMMISSION
v.
INTERNATIONAL DIAMOND CORPORATION, FULL SERVICE IMPORT BROKERS, INC., T. LEWSADER, S. GREENBAUM, S.G. DOHRMAN, and B. DOHRMAN*

Civ. A. No. 82-0878 FTC File No. 802 3167

United States District Court, Northern District of California
March 11, 1982

Pursuant to an agreement between FTC and parties to a complaint filed by the Commission in connection with the advertising and sale of gemstones, court entered a permanent injunction which, among other things, barred defendants from misrepresenting that diamonds are a low-risk investment; the ease with which a diamond can be sold; or the price, profit, or appreciation that is likely to be received upon resale. Defendants were also required to provide prospective customers with certain affirmative disclosures, including the fact that the corporation had filed for Chapter 11 reorganization in the Bankruptcy Court of the Northern District of California. The injunction was entered without prejudice to FTC's right to seek rescission or redress for consumers in instant action or in Bk. 1-92-00198, the pending Chapter 11 reorganization proceeding.

Before INGRAM, *District Judge:*

PERMANENT INJUNCTION

Whereas plaintiff, the Federal Trade Commission, commenced this action by filing the complaint herein, and whereas the plaintiff and defendant International Diamond Corporation/Full Service Import Brokers, Inc., have stipulated and agreed to entry by the Court without further notice of the following permanent injunction, therefore:

IT IS ORDERED, that defendant International Diamond Corporation/Full Service Import Brokers, Inc., a corporation, its successors and assigns, and its officers, employees, agents, representatives, brokers, or others who sell defendant's products, directly or through any corporation, subsidiary, division or other device, in connection with the purchasing, advertising, offering for sale, sale or distribution of any diamond or other precious or semiprecious stone in commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, be and are hereby permanently restrained and enjoined from:

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*Not otherwise reported.

I.

1. Misrepresenting in any manner, directly or indirectly, that International Diamond Corporation's prices are wholesale, or otherwise misrepresenting the relationship between International Diamond Corporation's prices and those generally available from other sellers of investment diamonds.

2. Representing, directly or indirectly, that a diamond is an investment which can be quickly sold by an individual investor for a price substantially the same as what an individual would have to pay to purchase such a diamond from International Diamond Corporation or another commercial source.

3. Misrepresenting in any manner, directly or indirectly, the ease with which a diamond can be sold or the price, profit, or appreciation likely to be received upon such resale.

4. Misrepresenting in any manner, directly or indirectly, the past or current price performance of diamonds.

5. Misrepresenting in any manner, directly or indirectly, that diamonds are a low-risk investment or otherwise misrepresenting the risks involved in purchasing diamonds as investments.

6. Misrepresenting in any manner, directly or indirectly, the nature and extent of any offer to buy back or broker diamonds sold.

7. Misrepresenting in any manner, directly or indirectly, the nature and extent of any guarantee offered in connection with the grading or certification of diamonds sold.

8. Failing to disclose, clearly and conspicuously in writing or orally, prior to the execution of any contract for sale of any diamond(s), the following information:

> (a) Diamonds are not as easy to sell as many other investments. If you seek a quick sale of a diamond, you will in many instance only be able to get a price significantly lower than the current selling price of the diamond.
>
> (b) Your chance of making a profit on your investment in diamonds may be dependent on your ability to resell your diamond through us. If you have to sell your diamonds other than through our brokerage service, there is a possibility you will suffer a loss.

9. Failing to disclose, clearly and conspicuously in writing and orally, before the execution of any contract for sale of any diamond(s), less than or equal to ⅓ carat in size, or of SI clarity grade, the following information:

> There is currently no active investors' market in which these diamonds can be sold. International Diamond Corporation is the principal place

for you to resell these diamonds. Resale for profit to other outlets such as retail jewelers may be difficult. Many jewelers will not buy these diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

10. Failing to disclose, clearly and conspicuously in writing and orally, prior to the execution of any contract for sale of any diamond(s), the exact coverage and limitations of any insurance covering the accuracy of grading or certification of the diamonds that International Diamond Corporation sells.

11. Failing to disclose, clearly and conspicuously in writing prior to the execution of any contract for sale of any diamond(s), and during the pendency of the proceeding Bk. No. 1-82-00198 in the Bankruptcy Court for the U.S. District Court, Northern District of California, the following information:

International Diamond Corporation filed for Chapter 11 reorganization under 11 U.S.C. sections 1101 *et seq.*, on February 18, 1982.

II.

It is further ordered, that the written affirmative disclosures required by Paragraphs 8 to 11 of this order shall appear as a notice on the front page of all sales agreements or on a separate sheet of paper given to customers before they sign the sales agreement. The separate sheet may not contain any other writing. The notice required shall be in the form set forth as follows:

1. At the bottom of the notice shall be the language "I have read this notice and understand what it says" and a place for the buyer's signature.
2. The text of the notice must be printed in no smaller than 9-point type and the heading "RISK FACTORS YOU SHOULD CONSIDER BEFORE INVESTING IN DIAMONDS" must be 2 type points larger and boldface. The capitalization, punctuation, and wording of the text and headings must be exactly as shown above.
3. The whole notice from the word "RISK" to the space for the customer's signature, must be boxed with lines 2 points thick, if the notice appears on the front page of a sales agreement.

III.

It is further ordered, that International Diamond Corporation distribute a synopsis of this order to all operating divisions of said corporation, and to all present or future persons selling diamonds or other gemstones for, or on behalf of, International Diamond Corporation, and all agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that International Diamond Corporation secure from each person a signed statement acknowledging receipt of said order.

IV.

It is further ordered, that International Diamond Corporation shall, within sixty (60) days after this order is entered by the Court, file with the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with this order.

V.

It is further ordered, that International Diamond Corporation shall comply with this order except where otherwise specified, beginning ten (10) days after entry of this order, provided, however, that to the extent that sales brochures already printed and disseminated by International Diamond Corporation may contain statements or other representations not in compliance with this order, defendant may effect compliance by affirmatively alerting customers to those portions that are in violation of this order or by otherwise excising such portions or advising consumers to disregard such noncomplying statements until such time as noncomplying sales brochures may be altered.

VI.

It is further ordered, that nothing in this order shall constitute an admission on the part of International Diamond Corporation that it has violated the FTC Act or any other law in this or in any other proceeding or action, nor shall anything in this order prejudice the right of the Federal Trade Commission to seek rescission or redress for consumers in this proceeding or in Bk. No. 1-82-00198.

HEUBLEIN, INC.
v.
FEDERAL TRADE COMMISSION et al.*

Civ. A. H-82-284 FTC File No. 82-3-003

United States District Court, District of Connecticut
March 16, 1982

1. **In such manner and at such time it deems advantageous to do so, corporation has right to make lawful investments on behalf of its shareholders.**

Corporation has right to make lawful investments on behalf of its shareholders in such manner and at such time as corporation deems it advantageous to do so.

2. **Where both companies sought to acquire 49.9% of the other's stock, and target company had already received an early termination from FTC with respect to its acquisition efforts, plaintiff was entitled to injunctive relief requiring FTC to grant its early termination request.**

Plaintiff corporation was entitled to injunctive relief requiring Bureau of Competition of Federal Trade Commission to grant it early termination of waiting period with respect to its proposed acquisition of up to 49.9% of target company's stock, after target company had already received early termination with respect to its efforts to acquire 49.9% of plaintiff.

3. **Because Congress, by enacting statute, declared violations of same to be contrary to the public interest thus causing irreparable harm; equitable requirements for injunctions are satisfied *per se* when violation of federal law is shown.**

Equitable requirements for injunction are satisfied *per se* when violation of federal law is shown since, in enacting statute, Congress declared that violations of statute are contrary to public interest and, therefore, cause irreparable harm.

4. **FTC had applied its policy of prohibiting early terminations in contested acquisitions discriminatorily and had not maintained its neutrality in denying plaintiff's request for early termination because no "special business reason" had been shown; and by denying early termination on ground unrelated to competitive considerations FTC had exceeded its jurisdiction and authority.**

Federal Trade Commission's denial of plaintiff corporation's request for early termination of waiting period with respect to its proposed acquisition of up to 49.9% of target company's stock exceeded Commission's authority and jurisdiction, where early termination was denied on ground unrelated to competitive considerations, Commission lacked authority not to grant early termination on ground that "special business reason" had not been shown, Commission was not, by its action, remaining neutral and Commission applied its policy of prohibiting early termination in contested acquisitions in discriminatory fashion.

5. **Court must determine whether FTC's decision was based on consideration of relevant factors and whether it is consistent with overall policy of the Administrative Procedure Act, in reviewing agency action under that Act.**

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*Reported in 539 F.Supp. 123 (1982)

In reviewing agency action under Administrative Procedure Act, court must determine whether agency's decision was based on consideration of relevant factors and whether it is consistent with overall policy of governing Act.

Plaintiff corporation brought suit challenging Federal Trade Commission's denial of early termination of waiting period required by Hart-Scott-Rodino Antitrust Improvements Act. The District Court, Clarie, Chief Judge, held that plaintiff was entitled to injunctive relief requiring Bureau of Competition of F.T.C. to grant it early termination of waiting period with respect to its proposed acquisition of up to 49.9% of target company's stock, after target company had already received early determination with respect to its efforts to acquire 49.9% of plaintiff.

Injunction granted.

(*Syllabus, with substituted captions, taken from 539 F.Supp. 123*)

Richard M. Reynolds, Thomas J. Groark, Jr., Day, Berry & Howard, Hartford, Conn., *Ray A. Jacobsen, Jr., Ralph J. Savarese, Howrey & Simon,* Washington, D.C., *George J. Caspar,* Gen. Counsel, Heublein, Inc., Farmington, Conn., for plaintiff.

Steven A. Newborn, W. Dennis Cross, Asst. Gen. Counsel for Litigation, F.T.C. **[124]** Washington, D.C., *Donna L. Fatsi,* Asst. U.S. Atty., *Alan H. Nevas,* U.S. Atty., Hartford, Conn., for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLARIE, *Chief Judge.*

This matter having come on to be heard upon the motions of the plaintiff Heublein, Inc. ("Heublein"), and the Court having held hearings on March 15, 1982, the Court pursuant to *Fed.R.Civ.P.* Rule 52, hereby sets forth the findings of fact and conclusions of law which constitute the grounds of its action.

1. *Factual Background*

A. *The Parties*

1. Plaintiff Heublein, is a Connecticut corporation having its principal place of business at Farmington, Connecticut. Heublein is engaged in the production and distribution of distilled spirits and wines, the operation and franchising of Kentucky Fried Chicken, H. Salt and Zantigo Mexican-American quick service restaurants, and the production and distribution of other specialty food products.

2. Defendant Federal Trade Commission ("Commission") is an agency of the United States and is organized and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, as amended, with its principal office at 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. The Commission is one of two federal agencies responsible for administering the premerger notification program established by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L.No.94-435, 90 Stat. 1390. 15 U.S.C. §§ 18a *et seq.* ("H-S-R Act").

3. Defendant James C. Miller III is Chairman, and defendants David A. Clanton, Michael Pertschuk and Patricia P. Bailey are members of the Federal Trade Commission. Defendant Thomas J. Campbell is Director of the Bureau of Competition of the Federal Trade Commission. The Bureau of Competition is the organizational unit of the Commission responsible for administering the premerger notification program under the H-S-R Act. The Commission has delegated to the Director of the Bureau of Competition the power to permit persons to consummate acquisitions which are subject to the H-S-R Act prior to the expiration of the waiting period prescribed in that Act.

B. *Hart-Scott-Rodino Act and Premerger Notification Regulations Relevant to This Case*

4. Title II of the H-S-R Act, enacted in 1976, added section 7A to the Clayton Act, 15 U.S.C. § 18a, which established a new premerger notification program governing certain acquisitions of voting securities or assets. The legislative purposes of Title II were to provide the Commission and the Antitrust Division of the United States Department of Justice ("Department"), in advance of an acquisition: (a) information concerning both the nature of the particular transaction and the competitive effects of the acquisition and (b) sufficient time to analyze the competitive effects of the acquisition to determine whether to challenge the acquisition prior to its consummation. H.R.Rep.No.94-1373, 94th Cong., 2d Sess. at 5-8, and S.Rep.No.94-803, 94th Cong., 2d Sess. at 69 U.S. Code Cong. & Admin.News 1976, p. 2572.

5. If a stock acquisition is subject to the H-S-R Act, both the acquiring and acquired parties must: (a) file with the Commission and the Department a premerger notification form and exhibits, which report the required information concerning their businesses and the details of the particular transaction; and (b) wait a prescribed period before consummating the acquisition, subject to the Commission's authority to extend or reduce that waiting period. 15 U.S.C. § 18a(a), (b), (d)(1).

6. After a premerger notification form and exhibits have been filed by an acquiring party with both the Commission and the Department, personnel of those agencies confer and decide which agency will assume **[125]** responsibility for analyzing those materials to determine whether the par-

ticular acquisition is likely to lessen competition or whether additional information or documents are required to make that determination.

7. In the case of an acquisition of voting securities on the open market through a national securities exchange or through private transactions, the waiting period under the Commission's premerger notification rules expires on the thirtieth day after the acquiring party has filed its premerger notification form and exhibits, unless: (a) the waiting period is terminated, by the Commission and the Department, prior to the expiration of the thirty-day period; or (b) prior to the expiration of the thirty-day period, the Commission or the Department (as the case may be) requires additional information or documents from either the acquiring or the acquired party. 15 U.S.C. § 18a(b)(1)(B), (2). Such a request for additional information or documents extends the H-S-R waiting period until the twentieth day following the agencies' receipt of such additional information or documents. 15 U.S.C. § 18a(e).

8. As amended by the H-S-R Act, section 7A(b)(2) of the Clayton Act expressly authorizes the Commission and the Department to reduce the H-S-R Act waiting period "and allow any person to proceed with any acquisition subject to" the H-S-R Act. 15 U.S.C. § 18a(b)(2). The Commission's premerger notification rules expressly provide that "early termination" of the waiting period may be granted either upon written request by a party to the acquisition or *sua sponte* by the Commission or the Department. 16 C.F.R. § 803.11(c).

9. A Formal Interpretation of those rules and regulations, issued by the Bureau of Competition on April 10, 1979, identifies the principles governing the Bureau's consideration of "early termination" requests. This Interpretation states that such requests will not be granted unless the Commission has concluded that it will not take any further action within the waiting period and unless the requesting party demonstrates "some special business reason that warrants early termination of the waiting period," such as a "need to complete the transaction before the waiting period would normally expire."

10. The Commission has granted early termination in 290 acquisitions since September 1978. Such acquisitions have included American Expess Corporation's acquisition of Shearson Loeb and Caterpillar Tractor Company's acquisition of a portion of International Harvester. Eleven early termination requests were granted in January 1982 alone.

11. Early termination has been granted in five contested, or hostile, acquisitions. These have included Wheelabrator-Frye Corporation's acquisition of Pullman, Inc. when J. Ray McDermott Inc. was also bidding for Pullman; Olympia & York Incorporated's acquisition of the Abitibi Price Co. of Canada, when another Canadian company was also bidding for Abitibi, and E.I. duPont de Nemours & Company's acquisition of Conoco when Mobil Corp. was also bidding for Conoco.

C. *Cinema's Request for Permission To Acquire up to 49.9% of Heublein's Stock*

12. General Cinema Corporation ("Cinema") is a Delaware corporation having its principal place of business in Chestnut Hill, Massachusetts, and is primarily engaged in bottling and marketing carbonated soft drinks and in the exhibition of motion pictures.

13. On February 4, 1982, Cinema filed with the Commission and the Department a premerger notification form and exhibits, in which Cinema sought approval from the Commission and the Department to acquire, through open market and private transactions, up to 49.9% of Heublein's common stock. Upon the filing of Cinema's premerger notification form, it was determined that the Commission, rather than the Department, would assume responsibility for evaluating the competitive effects of Cinema's proposed acquisition of up to 49.9% of Heublein's stock. **[126]**

14. On February 19, 1982, Heublein filed the premerger notification form and exhibits required to be submitted by parties whose stock may be acquired in a transaction subject to the H-S-R Act. 15 U.S.C. § 18a(a), (b); 16 C.F.R. § 801.30(b)(2).

15. Upon receipt of Cinema's and Heublein's premerger notification filings, the Commission reviewed Cinema's proposed acquisition of up to 49.9% of Heublein's stock and determined to allow Cinema to consummate the acquisition. Under the Commission's premerger notification rules, Cinema's waiting period expired at 11:59 p.m. on March 6, 1982, and, effective at that time, the Commission permitted Cinema to acquire up to 49.9% of Heublein stock.

D. *Heublein's Request for Permission To Acquire up to 49.9% of Cinema's Stock*

16. On March 2, 1982, Heublein filed a premerger notification form and exhibits in which Heublein sought approval to acquire, through open market or private transactions, up to 49.9% of Cinema's common stock. Under the Commission's premerger notification rules, the H-S-R Act waiting period with respect to Heublein's acquisition of up to 49.9% of Cinema's stock will not expire until 11:59 p.m. on April 2, 1981 unless reduced by the Commission pursuant to its authority to grant an "early termination" of the waiting period.

17. By letter dated March 2, 1981, submitted pursuant to section 7A(b)(2) of the Clayton Act, as amended by the H-S-R Act, Heublein requested that the Commission terminate the H-R-S Act waiting period with respect to Heublein's acquisition of up to 49.9% of Cinema's stock as soon as possible, but no later than the expiration of the waiting period with respect to Cinema's acquisition of up to 49.9% of Heublein's stock. As grounds for

early termination of its H-S-R Act waiting period, Heublein's letter of March 2, 1982 stated:

(a) That there is no likelihood that Heublein's acquisition of Cinema stock will lessen competition in any line of commerce in any section of the country;

(b) That unless Heublein's waiting period was terminated simultaneously with Cinema's, Cinema would be permitted to acquire up to 49.9% of Heublein's stock, while Heublein would not be permitted to acquire up to 49.9% of Cinema stock, and that such a result would be contrary to the legislative history and policies of the H-S-R Act.

E. *The Commission's Denial of Heublein's Request for Permission To Acquire Cinema's Stock Simultaneously with Cinema's Acquisition of Heublein's Stock*

18. On Thursday, March 4, 1982, the Bureau of Competition denied Heublein's request for early termination not because of any concern about the competitive effects of Heublein's acquisition of up to 49.9% of Cinema's stock, but because, in its view, Heublein had not demonstrated the existence of a "special business reason" in accordance with the Bureau's Formal Interpretation, dated April 10, 1979. The Bureau's position was that a "special business reason" was not shown by the fact that early termination was necessary so that Heublein would be free to acquire up to 49.9% of Cinema's stock at the same time that Cinema would be free to acquire up to 49.9% of Heublein's stock. The Bureau believed it should remain "neutral" with respect to contested acquisitions and believed that to grant early termination to Heublein in this case would be to favor Heublein and disfavor Cinema.

19. By letter dated March 5, 1982, Heublein requested that the Commission review and reverse the Bureau's denial of Heublein's early termination request. On Monday, March 8, and Tuesday, March 9, 1982, the Commission reviewed the Bureau's denial and decided not to reverse it.

F. *Cinema's Efforts To Deter Heublein's Acquisition of up to 49.9% of Cinema's Stock*

20. On March 9, 1982, Cinema was reported to have announced that it intended to acquire up to three million shares of its [127] own common stock. *Wall Street Journal,* March 9, 1982 at 52. It was reported that Cinema's acquisition of three million of its shares would increase the holdings of Cinema's chairman, vice chairman and their families to 47.5% of Cinema's then-outstanding shares. On March 12, 1982, Cinema was reported to have purchased on the open market 1,060.800 of its shares and increased its borrowing capacity from $160 million to $300 million. On that date, a share of Cinema's stock was reportedly priced on the open market at $42, the highest price of such stock in the previous fifty-two weeks. *Wall Street Journal,* dated March 12, 1982 at 46.

CONCLUSIONS OF LAW

I. *Jurisdiction*

1. Jurisdiction is vested in this Court by the provisions of 28 U.S.C. §§ 1331 and 1361.

II. *Venue*

2. Venue lies in this Court under 28 U.S.C. § 1391(e)(4), as the defendants are officials or employees of an agency of the United States and the plaintiff resides in this District.

III. *Standard for Granting a Temporary Restraining Order*

3. The standard enunciated by the United States Court of Appeals for the Second Circuit provides that a temporary or preliminary injunction will issue if the movant shows:

> (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 701 (2d Cir. 1980); *Lynch v. Maher,* 507 F.Supp 1268, 1271-72 (D.Conn. 1981); *Angell v. Zinsser,* 473 F.Supp. 488, 493 (D.Conn.1979).

IV. *Irreparable Harm to Heublein*

[1] 4. As a Connecticut corporation, Heublein has the right to acquire and sell property and to invest corporate funds, Conn.Stat. § 33-428. Moreover, a corporation has the right to make lawful investments on behalf of its shareholders in such manner and at such time as the corporation deems it advantageous to do so. *Missouri Portland Cement Co. v. Cargill, Inc.,* 498 F.2d 851, 868 n. 35 (2d Cir.), *cert. denied,* 419 U.S. 883, 95 S.Ct. 150, 42 L.Ed.2d 123 (1974); *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.,* 476 F.2d 687, 798 (2d Cir. 1973).

[2] 5. If Heublein's right to invest is to be preserved, Heublein must be permitted to invest now. Already, as a result of the Commission's actions described above, nine days have elapsed since Cinema became free to acquire up to 49.9% of Heublein's stock, and during this time Heublein has been prohibited from acquiring a like amount of Cinema's stock. The favorable market opportunities which, absent the Commission's action, would have been available to Heublein during that period, have been irretrievably lost. Moreover, Heublein cannot be compensated for such lost opportunities by money damages. Hence, Heublein has already been ir-

reparably harmed as a result of the Commission's action and it has no adequate remedy at law.

6. In addition, as each day passes during which Heublein is prohibited from acquiring up to 49.9% of Cinema's stock, Heublein loses the favorable market opportunities which would be available to Heublein were it able immediately to acquire up to 49.9% of Cinema's stock. In addition, Cinema's purchases of its own stock, and other actions which Cinema, as a target company, may take to defeat Heublein's effort to purchase Cinema's stock,[1] are further evidence of the likelihood that Heublein will be irreparably harmed unless it is immediately permitted to consummate its proposed acquisition of Cinema's stock. **[128]**

[3] 7. Heublein has also been irreparably harmed because the Commission's action has deprived Heublein of its right to due process under the Fifth Amendment and its rights under the Administrative Procedure Act ("APA"). Hence, irreparable harm to the public and to Heublein is presumed in this case because equitable requirements are satisfied *per se* when a violation of federal law is shown since, in enacting the statute, Congress declared that violations of the statute are contrary to the public interest and, therefore, cause irreparable harm. *Community Nutrition Institute v. Butz,* 420 F.Supp. 751, 754, 757 (D.D.C.1976); ["When Federal statutes have been violated, it has long been the rule that a court need not inquire into the traditional requirements for equitable relief."] *Lathan v. Volpe,* 455 F.2d 1111, 1116 (9th Cir. 1971); *Sierra Club v. Coleman,* 405 F.Supp. 53, 54-55 (D.D.C. 1975).

V. *The Balance of Hardships Tips Decidedly in Heublein's Favor*

8. The balance of hardships in this case decidedly favors issuance of a temporary restraining order to Heublein.

9. Neither defendants nor the public interest will be harmed if Heublein is permitted to acquire up to 49.9% of Cinema's stock, because defendants have determined to allow consummation of that acquisition.

10. Since neither the defendants nor the public interest will be harmed by issuance of the requested temporary restraining order and Heublein will be irreparably harmed absent such relief, the balance of hardships tips decidedly in favor of Heublein.

VI. *Heublein Is Likely To Succeed on the Merits of This Action*

A. *Heublein Is Likely To Succeed in Showing That the Commission Exceeded Its Statutory Jurisdiction and Authority in Denying Heublein's Request for Early Termination of the H-S-R Waiting Period*

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[1] Congress and the courts have recognized that target companies commonly take a variety of actions in attempting to defeat the acquisition of their stock in hostile transactions. H.R.Rep. No. 94-1373, 94th Cong., 2d Sess. at 12 (1976): *MITE Corp. v. Dixon,* 633 F.2d 486, 498 (7th Cir. 1980).

11. Sections 702 and 704 of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* provide for judicial review of the Commission's denial of Heublein's early termination request. (5 U.S.C. §§ 702, 704)

12. Under § 706(2)(C) of the APA, agency action must be set aside if it exceeds the agency's statutory jurisdiction or authority. That section provides:

> The reviewing court shall—(2) hold unlawful and set aside agency action, . . .
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

See National Labor Relations Board v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); *H & H Tire Co. v. United States Department of Transportation,* 471 F.2d 350, 355 (9th Cir. 1972).

[4] 13. The Commission's denial of Heublein's early termination request exceeded the Commission's jurisdiction and authority for each of several reasons. First, the H-S-R Act is intended to permit the antitrust enforcement agencies to evaluate the competitive effects of a transaction and the purpose of the H-S-R waiting period is to provide those agencies sufficient time, in advance of an acquisition, to conduct that analysis. But Heublein was denied early termination on a ground unrelated to competitive considerations. Hence, the Commission's denial of Heublein's request was contrary to the H-S-R Act's purpose and, therefore, beyond its jurisdiction and authority and serves no governmental purpose under the Act.

14. Second, Heublein was denied early termination because the Commission believed that Heublein's request was governed by the standards set forth in the Bureau of Competition's Formal Interpretation, dated April 10, 1979. That Formal Interpretation states that an early termination will not be granted unless the requesting party demonstrates a "special business reason" justifying early termination. However, neither the H-S-R Act nor its legislative history justifies a requirement that a **[129]** "special business" season be shown in order to obtain an early termination. If, as here, the Commission has determined well prior to the expiration of the waiting period that the particular transaction will not likely lessen competition and if, as here, Heublein has presented a lawful business reason for early termination, it is beyond the Commission's authority not to grant early termination on the ground that a "special business reason" has not been shown.

15. Third, Heublein's request was denied not because of any concern about the competitive effects of Heublein's acquisition of Cinema's stock, but because the Commission believed that it must remain "neutral" with respect to contested acquisitions and that to grant early termination to Heublein would be to favor Heublein and disfavor Cinema. This rationale is wrong because if the Commission intends to remain "neutral" with respect to the Heublein-Cinema acquisitions, it should grant Heublein early termination to permit Heublein to acquire Cinema's stock at the same time as Cinema is acquiring Heublein's stock.

16. Finally, the Commission has applied its policy of prohibiting early terminations in contested acquisitions in a discriminatory fashion.

17. For these reasons, Heublein is likely to succeed in establishing that the Commission's denial of Heublein's early termination request exceeded its jurisdiction and authority and must, therefore, be set aside.

B. *Heublein Is Likely To Succeed in Showing That the Commission Was Arbitrary, Capricious and Abused Its Discretion in Denying Heublein's Request for Early Termination of the H-S-R Waiting Period*

[5] 18. Section 706(2)(A) of the APA provides that on review of agency action:

> The reviewing court shall—(2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

In reviewing agency action under this standard, the court must determine whether the agency's decision was based on a consideration of relevant factors and whether it is consistent with the overall policy of the governing Act. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

19. For several reasons, Heublein is likely to succeed in establishing that the Commission's denial of Heublein's early termination request was arbitrary, capricious and an abuse of discretion: First, the H-S-R Act is intended to permit the antitrust enforcement agencies to evaluate the competitive effects of a transaction and to provide those agencies sufficient time to conduct that analysis. Heublein, however, was denied early termination on a ground unrelated to competitive considerations. Second, there appears to be no rational basis for the Bureau's requirement that a "special business reason" be shown in order to justify an early termination. Third, the Commission has granted a large number of early termination requests including many involving acquisitions among large companies. Fourth, there appears to be no rational basis for the Bureau's position that it must remain "neutral" with respect to contested acquisitions and that to grant early termination to Heublein would be to favor Heublein and disfavor Cinema. If the Commission intends to remain "neutral" with respect to the Heublein-Cinema acquisitions, it should grant Heublein early termination to permit Heublein to acquire Cinema's stock at the same time as Cinema is acquiring Heublein's stock. Finally, the Commission has applied its policy prohibiting early terminations in contested acquisitions in a discriminatory fashion. In this instance, to maintain a neutral posture, it is incumbent upon the Commission to grant an early termination, because to deny the same places it in an active posture against the petitioner corporation, Heublein.

20. For all of these reasons, Heublein will likely succeed in showing that Heublein's early termination request was arbitrary, capricious and an abuse of discretion.

AMERICAN ASSOCIATION OF FOUNDATIONS FOR MEDICAL CARE
v.
FEDERAL TRADE COMMISSION*

No. 81-2014 FTC File No. 781 0002

United States Court of Appeals, District of Columbia
March 31, 1982

In an action for attorney's fees and costs, appellate court remanded the petition to the district court that had granted summary judgment for petitioners with respect to seven of ten documents withheld from FOIA disclosure by FTC. Court held that remand was an appropriate course of action where trial court had not set forth any reasons for denying attorney's fees and had not heard any argument on the issue before granting summary judgment. Further, decision regarding attorney's fees and costs has been frequently held to be within trial court's discretion. In deciding this issue, district court must determine whether petitioners had "substantially prevailed" and whether a balancing of relevant factors justified an award of attorney's fees and costs. Such factors include benefit to the public stemming from the suit; the nature of plaintiff's interest in the released information; and whether withholding of the data had a reasonable basis in law.

Before WRIGHT, *Circuit Judge*, CELEBREZZE,** *Senior Circuit Judge*, and WALD, *Circuit Judge*.

JUDGMENT

PER CURIAM

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and was briefed by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED by this court that this case is hereby remanded to the District Court for consideration in its discretion of the question of Freedom of Information Act attorney's fees and other litigation costs prayed for in appellant's complaint.

MEMORANDUM

The appellant, American Association of Foundations for Medical Care (AAFMC), describes itself as a "nonprofit association of physician sponsored prepaid health plans including Individual Practice Association ('IPA') type Health Maintenance Organizations ('HMOs') and Foundations for Medical Care ('FMCs')." Appellant's brief at vii. It was vitally interested in Federal Trade Commission rulemaking proceedings regarding "medical participation in control of certain open-panel medical prepayment plans," initiated by *Federal Register* notice in March 1980. Appellant's brief contends that the rule proposed by the FTC staff "would have the effect of outlawing virtually all IPA type HMOs and FMCs and the concomitant effect of leaving subscribers of such HMOs without necessary health and medical coverage." Appellant's brief at 3.

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*Not otherwise reported.

**Of the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

AAFMC submitted two extensive Freedom of Information Act requests to the FTC, seeking the underlying documentation for two staff reports prepared by the FTC prior to issuance of the notice of proposed rulemaking. The first request was denied; the second request was partly granted and partly denied. The FTC released approximately 4,000 pages of documents to AAFMC but withheld 2,000-2,500 pages, claiming various FOIA exemptions. Further negotiations between counsel for AAFMC and the FTC narrowed the documents at issue. After AAFMC brought suit, the parties were able to agree that only ten documents were in dispute.

The District Court granted summary judgment for AAFMC, the requestor, with respect to seven of the documents, and summary judgment for the FTC for the other three documents (found after *in camera* inspection to be protected by Exemption 5 of FOIA). The District Court also ordered "that in all other respects, judgment be, and hereby is, entered in favor of defendant." Order in Civil Action No. 80-0896 filed July 13, 1961 [*sic*], Appendix B to appellant's brief at 12. AAFMC asserts that this portion of the order rejected appellant's request in its complaint, Appendix B to appellant's brief at 5, that "the Court grant plaintiffs [*sic*] costs and attorney's fees and such other relief as may be just and proper." However, no separate motion for attorney's fees and costs had been filed by plaintiff. The District Court did not set forth any reasons for denying attorney's fees and costs, and it did not hear argument on the issue before granting summary judgment.

Under the circumstances, a remand is the appropriate course of action. This court and other Courts of Appeals have frequently noted that the decision whether to grant or deny attorney's fees and costs is within the discretion of the trial court. For example, in *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977), this court stated:

> [A]lthough both sides in this litigation have urged us to decide the question of attorney fees ourselves, the more appropriate course is to remand for a decision by the district court in light of the relevant factors we have articulated in this opinion. We may well have the authority to make our own discretionary decision under section 552(a) (4) (E), but in this area where, as we have emphasized, Congress has relied on the broad discretion of the courts, it is better to have that discretion exercised by the court which has been most intimately associated with the case. * * *

559 F.2d at 716 (footnote omitted), *quoted in Church of Scientology of California v. Harris*, 653 F.2d 584, 590-591 (D.C. Cir. 1981). The court

in *Scientology* noted that a Section 552(a) (4) (E) award must be based on a reasoned consideration of "all relevant factors," and added that "[t]he record before us is simply insufficient for us to evaluate all the relevant factors * * *." 653 F.2d at 590. *Accord, Cox v. U.S. Dep't of Justice,* 601 F.2d 1, 7 (D.C. Cir. 1979) (*per curiam*) (noting that District Court's views on relevant factors had not been indicated); *Fenster v. Brown,* 617 F.2d 740, 742 (D.C. Cir. 1979), *citing Cuneo v. Rumsfeld,* 553 F.2d 1360, 1367 (D.C. Cir. 1977); *Blue v. Bureau of Prisons,* 570 F.2d 529, 534 (5th Cir. 1978).

The District Court must decide two questions: (1) whether AAFMC "substantially prevailed," and (2) whether a balancing of factors justifies an award of attorney's fees. The relevant factors include: the benefit to the public, if any, derived from the suit, the nature of the complainant's interest in the released information, and whether the agency's withholding of the records had a reasonable basis in law. *Cox, supra,* 601 F.2d at 7. In this case, it may well be that AAFMC's private interest in forestalling adverse government rulemaking was so strong that an award of attorney's fees would be inappropriate.

Remanded

FEDERAL TRADE COMMISSION
v.
FOREMOST-McKESSON, INC.*

79-Civ. 0162 (PNL) FTC Docket No. C-2427

United States District Court, Southern District of New York
March 31, 1982

In a civil penalties action, FTC alleged that a trade show operator had violated a 1973 cease and desist order which barred respondent from accepting promotional payments from participating suppliers disproportionate to those given to its competitors. Court denied defendant's motion to dismiss the ninth claim of FTC's complaint for failure to state a claim upon which relief could be rendered, and granted Commission's cross-motion to amend that claim to allege additional violations in subsequent trade shows and include the names of suppliers who had not been mentioned in previous claims. Court noted that since defendant had sufficient notice of what plaintiff intended to prove, the amendment would merely conform the pleadings to the case. While prejudice opposing party might suffer must be taken into account, leave to amend a complaint is within court's discretion and "shall be freely given when justice so requires." Defendant had asserted prejudice solely on ground that amendment would cause undue delay. However, any delay resulting from the amendment would seem to be a minor one compared to the strain on judicial resources that would be entailed if FTC brought its ninth claim as a separate case. Further, defendant was partially responsible for any delay ensuing from the amendment since it had not attacked the validity of the original ninth claim for almost two years after the complaint was filed.

Before LEVAL, *District Judge.*

MEMORANDUM ORDER

This is a civil penalty action against defendant Foremost-McKesson under section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*) (Supp. IV 1980), for alleged violations of a cease and desist order issued by plaintiff. In re Foremost-McKesson, Inc., 83 F.T.C. 228 (1973). Plaintiff alleges that defendant, in conducting trade shows, received promotional considerations from its suppliers that it knew or should have known were greater than the consideration received by competitors of defendant from the same suppliers. The complaint contains nine claims: the first eight relate to a trade show held by defendant in 1976. The ninth claim, which is at issue here, makes claims concerning other possible violations by the defendant related to other suppliers not mentioned in the first eight claims and to other trade shows held by defendant after 1976. Defendant now moves under Fed. R. Civ. P. 12(c) to dismiss the ninth claim for failure to state a claim upon which relief can be granted. Plaintiff cross-moves for leave to amend the complaint.

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*Not otherwise reported. For case before the Commission, see 83 F.T.C. 228.

The ninth claim reads as follows:

> 62. The allegation contained in Paragraphs 1 through 6, inclusive, are repeated and realleged as though fully set forth herein.
>
> 63. In connection with the 1976 trade show or trade shows subsequently conducted, defendant entered into or may have entered into further arrangements with its suppliers similar to those identified in Counts I through VIII above which may have also violated the Commission's order to cease and desist.

Complaint ¶¶ 62-63. Although I have described, in my order of February 23, 1981, this claim as "exceptionally vague (pleading a possibility upon a possibility)," I then decided that "nonetheless the Commission has a valid motive in seeking to establish additional instances of violation by Foremost in that each additional violation shown will warrant the imposition of an additional penalty on Foremost." *Federal Trade Commission v. Foremost McKesson, Inc.*, No. 79-0162, slip op. at 9 (S.D.N.Y. Feb. 23, 1981 (order denying in part motion of nonparty Timex Corporation to quash subpoena or for protective order). My decision on the discovery matters involved was explicitly based on plaintiff's right under the ninth claim to pursue discovery against suppliers not named in the complaint and suppliers involved in trade shows of defendant other than the 1976 show. *Id.* at 2, 9. I did not address directly the validity of the ninth claim in that order.

Plaintiff moves to replace the ninth claim with a claim that names the suppliers involved who are not named in earlier claims, that alleges that defendant violated the cease and desist order in 1976 in transactions involving the newly named suppliers, and that defendants committed similar violations during the course of its trade shows in New Orleans in 1977 and in Las Vegas in 1978.

Fed. R. Civ. P. 15(a) states that leave to amend a complaint "shall be freely given when justice so requires." Leave to amend is within the discretion of the court. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971). In exercising its discretion, the court must take into account any prejudice the opposing party might suffer. *Id.* at 330-31, 91 S. Ct. at 802. Prejudice may include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

Defendant claims that the proposed amendment adds fifty-seven new allegations of violation to the eight previously pleaded, that extensive new discovery will be required on both sides, and that plaintiff's two and one-half year delay in amending the complaint is highly prejudicial. Plaintiff's contention is that the proposed amendment does not add any new issue to the case and that it would not require discovery "other than that which already is part of the case." Memorandum of Plaintiff at 36. Plaintiff relies most heavily on its assertion that the issue has been in the case throughout discovery, and thus defendant has had sufficient notice of what plaintiff intends to prove. Therefore, plaintiff argues, the amendment merely conforms the pleadings to the case.

Defendant does not contend that plaintiff's motion is brought in bad faith or with dilatory motives, or is an exercise in futility. Plaintiff has not moved previously to amend the complaint. *See Foman v. Davis,* 371 U.S. at 182, 83 S.Ct. at 230. Defendant's sole ground for asserting prejudice is that the amendment will cause undue delay. Although I do not believe that plaintiff is correct in asserting that no additional discovery will be required, the delay that may result would seem to be a minor one compared to the strain on judicial resources that would be entailed if plaintiff brought claim nine as a separate case. Moreover, it is apparent from the course of discovery and from my order of February 23, 1981, that defendant had sufficient notice of the scope of the case. Even if the amendment will cause delay, defendant is at least partially responsible: it did not attack the validity of the original ninth claim until almost two years after the filing of the complaint.

Although it would have been preferable to have had the ninth claim clarified long ago, plaintiff's motion to amend the complaint is granted. Defendant's motion under Rule 12(c) is denied.

So ORDERED

FORD MOTOR CO., FORD MOTOR CREDIT CO., and FRANCIS FORD, INC.
v.
FEDERAL TRADE COMMISSION et al.*

Nos. 79-7647 and 79-7654 FTC Docket No. 9073

United States Court of Appeals, Ninth Circuit
April 5, 1982

Court denied FTC's petition for a rehearing and rehearing en banc of an earlier decision which held that FTC had exceeded its authority by proceeding by adjudication rather than by rulemaking, finding that dealer's repossession and resale practices violated the FTCA, would have widespread application and would create new law. A dissenting judge would have granted an en banc rehearing, on the basis that the court's opinion creates confusion as to the state of law in the Ninth Circuit and appears to conflict with the general principles of administrative law previously enuniciated by the Supreme Court.

Michael J. Esler (argued), of *Esler & Schneider,* Portland, Ore. for petitioners.

Ernest J. Isenstadt (argued), FTC, Washington, D.C. for respondent.

Before: GOODWIN, KENNEDY and ALARCON, *Circuit Judges.*

ORDER

The panel voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court having been advised of the suggestion for an en banc rehearing, a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. 35(b). Upon the vote of the eligible judges in active service, a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

REINHARDT, *Circuit Judge,* dissenting from denial of rehearing *en banc:*

I dissent from the court's refusal to rehear this case en banc. I believe the opinion creates unnecessary and undesirable confusion as to the state of the law in our circuit, and that the standard we appear to announce conflicts with the general principles of administrative law, previously enunciated by the Supreme Court, which will remain applicable in the rest of the nation. Unless the Supreme Court grants certiorari, and applies a different standard than we appear to be adopting, government agencies will be required to ask us on a case by case basis to limit, narrow, and explain away the overly broad rationale set forth in the opinion.

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*Reported in Trade Reg. Rep. ¶ 64,665 at 73,618 (1982-1 Trade Cases). *Cert. denied* November 8, 1982. For case before the Commission, see 94 F.T.C. 764.

I believe that our circuit would be better served if we did the necessary job ourselves. I think that it is *our* function to correct our errors in cases of general importance, especially when our decision conflicts with earlier binding precedent in our circuit and when we have failed to distinguish, or even discuss, that applicable precedent. The best way to do this is through our en banc process.

The panel explains its decision by stating "[u]ltimately, however, we are persuaded to set aside this order because the rule of the case made below will have general application. It will not apply just to Francis Ford." *Supra,* at 4252. This statement simply cannot be reconciled with our recent decision in *NLRB v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979), which remains the law in this circuit. There we said:

> The Hospital initially argues that the holding of the *Mercy* decision, because it is to be generally applied, was tantamount to a rule. The Hospital further contends that, because of the Board's failure to follow the procedures for agency rulemaking, as delineated in 5 U. S. C. § 553, the rule is unenforceable. Contrary to the Hospital's argument, it has been consistently held that "the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Thus, the mere fact that the Board created a binding policy by adjudication does not affect the policy's validity especially where it covers an area in which the Board is permitted to act pursuant to its discretion.

601 F. 2d at 414 (citations omitted). Nor can the panel's explanation of its decision be reconciled with *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974), *NLRB v. Wyman-Gordon,* 394 U. S. 759 (1969), or *Securities Comm'n v. Chenery Corp.,* 332 U.S. 194 (1947). Those cases make it clear that administrative agencies *are* authorized to engage in decision making which results in standards to be applied in all future cases. The panel's statement that rulemaking is required because the decision would have "general application," and because it will have an effect in the long run on persons other than the individual whose case was before the agency, constitutes an unwarranted and unique acceptance of the "perennial plaint" that decisions of administrative agencies should be invalidated because of their "general" impact. See *British Caledonian Airways, Ltd. v. CAB,* 584 F.2d 982, 992 (D.C. Cir. 1978).

The panel's opinion pays lip service at most to the basic principle of administrative law that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," *NLRB v. Bell Aerospace Co.,* 416 U. S. 267, 294 (1974); *NLRB v. Children's Baptist Home,* 576 F. 2d 256 (9th Cir. 1978). While repeating the rule, the panel opinion gives it no weight and no significance; and the panel fails to state explicitly that the agency abused its discretion.

The panel cites only one of our prior decisions. *Patel v. INS,* 638 F. 2d 1199 (9th Cir. 1980). In *Patel,* we refused to permit the Immigration and Naturalization Service to use an earlier adjudication to create or impose a job creation requirement on an alien seeking the investor exemption from labor certification requirements. The holding in *Patel* turned on two factors: (1) the INS, "confusion" regarding the job creation requirement, *id.* at 1205; cf. *Ruangswang v. INS,* 591 F.2d 39, 46 (9th Cir. 1978) (Sneed, J., concurring); and (2) "the resulting hardship to Patel . . . ." *Patel,* 638 F. 2d at 1205. Neither of those factors is present here and the holding in *Patel* does not support the panel's analysis.

Since the call for an en banc vote failed to muster the support of an absolute majority of the active members of this court who were eligible to vote,[1] it would appear that a number of my colleagues are not as concerned as I am with the conflict between the broad, generalized statement in the panel's opinion and our own prior precedents which carefully apply the applicable line of Supreme Court cases in this area. My colleagues may believe that the broad, generalized statement is limited by the specific explanations subsequently offered in the panel's opinion. Specifically, they may feel that the opinion stands only for the proposition that an administrative agency decision which creates a new and different national interpretation of the uniform law (in this case the Uniform Commercial Code) applicable in all of the states of this nation is beyond an agency's decision making powers, at least where the agency has proposed a rule which would have that effect but has not yet enacted it.[2] If this is my colleagues' view, the damage caused by the panel's opinion will be minor and temporary. I think we would be better served, however, if we would clarify the law of the circuit now, through the en banc procedure, rather than allow the unnecessary confusion which will inevitably exist in the field of administrative law pending the time that we explain the limitations of the majority's opinion in our subsequent decisions.

The en banc procedure provides us with a valuable tool. It allows us to function efficiently, to resolve intracircuit conflicts and to ensure that cases of major importance are decided in a manner which reflects the law as we see it as a circuit, and as we will apply it in the long run. When we fail to take advantage of that tool, we create unnecessary work for the Supreme Court, and for ourselves if the Supreme Court fails to act. I regret that we did not take the opportunity to clarify the law in the case before us. I am confident that had we done so we would have expressed the applicable principles of administrative law in a different and more traditional manner than the panel does here.

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[1] Under our limited en banc rule, a call for an en banc vote prevails only when affirmative votes are cast by a majority of the 23 active members of the court who are not disqualified from voting. We then form a limited en banc panel of 11 judges, comprised of 10 judges drawn at random and the Chief Judge. When we deny an en banc request, after a vote is called for, we do not announce the number of judges who voted to grant the request. All that we reveal by our announce- ment that an unsuccessful vote was taken is that fact that fewer than 12 active judges voted to hear the case en banc. The reference in the text to the requirement of an absolute majority therefore does not constitute any indication as to the number of judges supporting the request in this case or any indication as to how the court divided. To the contrary, it is merely a reflection of the rule we follow in all cases.

[2] In *Patel,* while our holding was limited to the factors described in the text, *supra,* we also concluded that the so- called *Heitland* rule established in an adjudicatory proceeding was an "improper circumvention of rule-making procedure." We stated:

"Only months before, the INS itself had recognized the desirability of establishing a job-creation standard by rulemaking when it proposed the 1973 regulation. See 37 Fed. Reg. 23274 (1972); 38 Fed. Reg. 1379 (1973). The INS eventually failed to include the job-creation standard in its rule. Under the authority of *Wyman-Gordon,* we conclude that if the INS wished to add the job-creation criterion, it should have done so in a rulemaking procedure." *Patel v. INS,* 638 F. 2d 1199, 1204 (9th Cir. 1980).

Here, the agency had proposed the adoption of the standard as part of a regulation it was considering, but adopted the standard in an adjudicatory proceeding before the rule-making process was completed. Thus, my colleagues may believe that, as in *Patel,* the agency circumvented the rule-making process and that, notwithstanding the panel's broad general statements, the panel opinion will be so limited if we are asked to consider it in future cases.

UNITED STATES
v.
JS&A GROUP, INC., et al.*

No. 81-C 4967 FTC File No. 792 3108

United States District Court, Northern District of Illinois
April 26, 1982

1. **Civil penalties provision of Magnuson-Moss Act applies to rule violations regardless of whether Rule was formalized prior to enactment of Act, and thus promulgated under less stringent rulemaking procedures.**

Civil penalties provided by the Magnuson-Moss Act apply to violations of rules promulgated by the FTC before the Act was adopted and rules with respect to which procedures leading up to promulgation of the rules were conducted before the Act was adopted.

2. **Interpretations rendering Congressional language meaningless are improper.**

Constructions which would render language passed by Congress meaningless are not favored.

3. **Regardless of whether or not an administrative complaint is contemplated, FTC has authority to seek permanent injunctions in any case where it can demonstrate likelihood of ultimate success on the merits.**

The Federal Trade Commission is legally authorized to seek permanent injunction against rule violations in all cases in which it believes that it can prove the necessary facts, irrespective of the pendency of an administrative complaint.

The United States brought suit seeking civil penalties and permanent injunctive relief with respect to alleged violations of a trade regulation rule concerning mail order merchandise promulgated by the Federal Trade Commission. On defendant's motion to dismiss, the District Court, Decker, J., held that: (1) civil penalties provided by the Magnuson-Moss Act apply to violations of rules promulgated by the FTC before the Act was adopted and rules with respect to which procedures leading up to promulgation of the rules were conducted before the Act was adopted, and (2) the FTC has authority to seek permanent injunction against rule violations irrespective of pendency of administrative complaint. Motion denied.

(*Syllabus, with substituted captions, taken from 547 F.Supp. 20*)

Dan K. Webb, U.S. Atty., *Margaret C. Gordon,* Asst. U.S. Atty., Chicago, Ill., for plaintiff.

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*Reported in 547 F.Supp. 20 (1982), *aff'd,* 716 F.2d 451 (1983).

Victor E. Grimm, Bell, Boyd & Lloyd, Chicago, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

Decker, *District Judge.*

Plaintiff, the United States of America, acting upon the notification of the Federal Trade Commission ("FTC" or "Commission"), brought this action against defendants, JS&A Group, Inc. ("JS&A"), and Joseph Sugarman, alleging that they violated a trade regulation rule concerning mail order merchandise ("mail order rule"), 16 C.F.R. § 435, promulgated by the FTC. Essentially, the complaint alleges that defendants solicited and processed orders for the sale of mail order merchandise in such a manner as to constitute an unfair or deceptive trade practice in violation of the mail order rule. Plaintiff seeks to recover civil penalties pursuant to 15 U.S.C. § 45(m)(1)(A) for the past violations and to **[21]** obtain permanent injunctive relief against future violations.Currently before the court is defendants' motion to dismiss.

Defendants' motion is based on the claim that the FTC is not entitled to seek the two remedies that it requests in its complaint but rather is limited to seeking a cease and desist order in an administrative proceeding against violations of the mail order rule.Because the court believes that defendants' arguments concerning the civil penalties provision are the more significant, they will be considered first.

Prior to the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Act"), 88 Stat. 2183, which was effective on January 4, 1975, FTC enforcement of its substantive rules was limited to administrative proceedings in which the FTC was empowered to issue cease and desist orders prohibiting future rule violations. The FTC did not have the authority to directly impose fines or penalties for violations, or to seek them in the district courts.

Congress, in 1974, passed the Magnuson-Moss Act for the purpose of, *inter alia,* "provid[ing] the Federal Trade Commission (FTC) with means of better protecting consumers." H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7702. For the first time, the FTC was expressly granted the authority to issue substantive rules.[1] As part of that authority, Congress included Section 202(a) of the Magnuson-Moss Act, which set up a more stringent method of rule-making than that contemplated by the general provisions of the Administrative Procedure Act ("APA"). Among other things, the Magnuson-Moss Act requires the FTC to make a more detailed notice of rule-making than it would under the APA, to hold an oral hearing where interested persons may present their evidence and conduct cross-examination, and to provide compensation for attorneys' fees and other costs to people who represent interests at the rule-making that would not otherwise be fairly represented. Also, the Magnuson-Moss Act provides for a more stringent judicial review of the factual basis underlying an FTC rule than does the APA.

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[1] Before passage of the Magnuson-Moss Act, the FTC relied on Section 6(g) of the FTC Act (15 U.S.C. § 46(g)) for its authority to issue substantive rules. In their initial memorandum in support of their motion to dismiss, defendants note that it was long believed, by commentators and the FTC itself, that Section 6(g) only provided for procedural rules and did not authorize the FTC to issue substantive rules. Consequently, defendants suggest that the mail order rule is invalid. The issue raised by defendants was laid to rest, however, in the case of *National Petroleum Refiners Ass'n. v. FTC,* 482 F.2d 672 (D.C.Cir. 1973), *cert. denied,* 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974). There, the Court of Appeals carefully considered the statutory history of the FTC Act, and concluded that the FTC did have the power to validly promulgate substantive rules. Defendants have failed to suggest any persuasive reason why this court should not follow the National Petroleum decision. Therefore, the court finds that the mail order rule is valid. The question of what mechanism may be used by the FTC to enforce the rule still remains.

In addition to setting up this new rule-making structure for FTC substantive rules, the Magnuson-Moss Act also provided new methods of enforcing the rules. Chief among the new enforcement mechanisms is Section 205(m)(1)(A) of the Act, 15 U.S.C. § 45(m)(1)(A). That provision states in relevant part:

> The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices . . . with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not mre than $10,000 for each violation.

Such civil penalties had previously been available for violations of a final cease and desist order; however, they could not be used to directly enforce a substantive rule. **[22]**

The procedures leading up to the promulgation of the FTC's mail order rule were conducted before the Magnuson-Moss Act was adopted.All that remained after the effective date of the Act was the final announcement of the rule in the Federal Register, which was done on October 22, 1975, and publication of the statement of basis and purpose on November 5, 1975. In considering the rule, the FTC followed the procedures outlined in the APA, and did not follow the more stringent procedures of the Magnuson-Moss Act, which, of course, had not yet been enacted.

[1] Defendants' position in their motion to dismiss is that, because the mail order rule proceedings were conducted prior to the adoption of the Magnuson-Moss Act and so did not follow the new stringent procedures provided by Congress, violations of the rule should not subject the defendants to the new penalties provided by that Act. Defendants' argument requires the court to consider the effect and purpose of three statutory provisions included in the Magnuson-Moss Act in an attempt to divine Congress' intent.[2]

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[2] One other district court has discussed the question raised in this case. *See United States v. Hertz Corp.*, 1981-1 Trade Reg. Rep. (CCH) ¶ 64,023 (S.D.Fla. 1981). Because it is apparent that all the arguments made by defendants here were not considered in that case, the court wil expand on the reasoning in *Hertz*.

As an initial response, the FTC argues that the civil penalty section is clear on its face. Section 205(a) of the Magnuson-Moss Act allows the FTC to recover civil penalties for violations of "*any* rule under this Act" (emphasis added). Focusing on the phrase "any rule," the FTC suggests that Congress intended the civil penalty provision to apply to rules promulgated before the Magnuson-Moss Act was passed, as well as rules promulgated thereafter. The FTC's position is supported in an article written by an attorney on leave from the Commission, where the author states, "Section 5(m)(1)(A) clearly imposes civil liability for violations of 'any' Commission trade regulation rule, whether adopted before or after January 4, 1975, the effective date of the Magnuson-Moss Act." Bickart, *Civil Penalties under Section 5(m) of the Federal Trade Commission Act,* 44 U. Chi.L.Rev. 761, 770 (1977).

The court is unable to accept that argument put forth by the FTC. It appears that, on this point, the Magnuson-Moss Act is ambiguous.When Congress refers to "any rule under this Act," it is not at all clear whether the act referred to is the Federal Trade Commission Act as a whole, or only the Magnuson-Moss Act. Nor does the quite sparse legislative hsitory of the civil penalty provision itself provide any clues to how that ambiguity should be resolved.

Defendants argue that the legislative history of the Magnuson-Moss Act, as a whole, requires the court to find that Congress did not intend the civil penalty provision to apply to rules promulgated before the Act was passed. Defendants point particularly to Congress' concern about the procedures followed by the FTC in rule-making:

> Because of the potentially pervasive and deep effect of rules defining what constitutes unfair of deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices", the committee believes greater procedural safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described below which we believe to be more appropriate in this context than merely relying upon the provisions of sections 553 and 706 of title 5 [the APA].

H.R. Rep. No.93-1107, *supra,* at 7727. Defendants contend that it would be unfair to apply the harsh civil penalties to rules promulgated under the less stringent requirements of the APA, and that it would substantially emasculate the new requirements if old rules had the same effect as the new ones.

Though Congress was concerned about the procedures used by the FTC in promulgating its earlier substantive rules, it did not regard those rules to be any less valid, **[23]** however. As part of Section 202 of the Magnuson-Moss Act, Congress addressed the issue of the validity of the FTC rules already in effect and those about to go into effect.

> (c)(1) The amendments made by subsections (a) and (b) [the new rulemaking procedures] of this section shall not affect the validity of any rule which was promulgated under section

> 6(g) of the Federal Trade Commission Act prior to the date of enactment of this section. Any proposed rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments was substantially completed before such date may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.

The parties here do not dispute that the mail order rule properly fits into the second category recognized by Congress in the subsection, and so was not rendered invalid by the new rule-making procedures. *See United States v. Braswell, Inc.,* 1981-2 Trade Reg.Rep. (CCH) ¶ 64,325 (N.D.Ga. Sept. 28, 1981).

It appears from the above "savings provision" that Congress did intend the civil penalties to apply to violations of the pre-Magnuson-Moss Act rules. Defendants suggest that the court should interpret the phrase "with the same validity as such rule could have been promulgated had this section not been enacted" to mean that all provisions of the Magnuson-Moss Act should not apply to the old rules, including the civil penalty provision. Congress was careful, however, to only exempt the old rules from the requirements in Section 202 of the Act. There is nothing in the savings provision or its legislative history to indicate that the civil penalty provisions in Section 205 were also excluded. Nor is there any indication that Congress intended to create a two-tiered system of rules with different enforcement mechanisms, as defendants suggest.

Other aspects of the Magnuson-Moss Act and its legislative history support the inference that Congress intended that old rules like the mail order rule would be enforced by civil penalties, rather than only by cease and desist orders. Though there is no question that Congress, at the time the Magnuson-Moss Act was passed, was concerned about the procedures used by the FTC in promulgating its substantive rules, Congress also indicated its displeasure at the ineffectiveness of using cease and desist orders to enforce the rules.

> Notwithstanding the 1938 amendments, the Wheeler-Lea Act, the FTC continued to be hampered as an effective force in promoting fair and free competition and safeguarding the consuming public against unfair or deceptive acts or practices by the scope of its authority being limited to matters in 'commerce' and by being made to rely solely on the cease and desist order procedure for enforcement.

H.R.Rep. No. 93-1107, *supra,* at 7712. In the absence of any clear statements to the contrary, it would be incongruous to assume that Congress wished the FTC to continue to be hampered by what it expressly considered to be an ineffective enforcement mechanism.

[2] And finally, when Congress did turn its attention to the question of whether the civil penalty provision would apply retroactively, it enacted the following provision:

> (b) The amendment made by subsection (a) of this section [the civil penalty provision] shall not apply to any violation, act, or practice to the extent that such violation, act, or practice occurred before the date of enactment of this Act.

Magnuson-Moss Act, § 205(b). This provision speaks in terms of the time of the violation, not in terms of when the particular rule that was violated was promulgated. In fact, if defendants' position is correct, that section of the Magnuson-Moss Act is largely stripped of all meaning. By definition, there could be no rule violations before the enactment date, if there were no rules at that time to which the civil penalty provision applied. Constructions which render language passed by Congress meaningless are not favored. **[24]**

In addition to their arguments based on the language and history of the Magnuson-Moss Act, defendants also claim that their position is supported by general legal doctrine. First, defendants argue that applying the civil penalties to rules promulgated before the Act was passed would result in the Act being enforced retrospectively and that such constructions are not favored. And second, defendants suggest that this court follow the reasoning of the cases under the Finality Act of 1959 and hold that the civil penalty provision does not apply to the mail order rule. Neither of defendants' arguments is persuasive.

The cases cited by defendants in support of their proposition that retrospective constructions of punitive statutes are to be avoided, *U.S Fidelity Co. v. Struthers Wells Co.,* 209 U.S. 306, 28 S.Ct. 537, 52 L.Ed. 804 (1908), and *South East Chicago Commission v. Department of Housing and Urban Development,* 488 F.2d 1119 (7th Cir. 1973), involve the application of statutes to conduct undertaken before the effective dates of the relevant statutes. Here, the conduct under attack by the FTC is defendants' alleged violations of the mail order rule. All violations that are the subject of the instant litigation took place well after the Magnuson-Moss Act was enacted. Consequently, this case involves a prospective application of the civil penalty provision, not a retrospective one. Therefore, defendants' argument is irrelevant.

Also largely irrelevant is defendants' argument based on the Finality Act cases, *FTC v. Jantzen, Inc.,* 386 U.S. 228, 87 S.Ct. 998, 18 L.Ed.2d 11 (1966), and *FTC v. Broch & Co.,* 368 U.S. 360, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962). The Finality Act provided civil penalties for violations of certain FTC cease and desist orders. In the two cases cited, the Supreme Court noted that the FTC was not authorized to seek civil penalties for violations of cease and desist orders entered before the Finality Act was passed. That conclusion, however, was not based on any general proposition that Congress could not apply civil penalties to future violations of a previously adopted FTC rule or order, but rather on the fact that Congress expressly provided that civil penalties would not apply to the earlier cease and desist orders. The following provision was part of the Finality Act:

> The amendments made by section 1 have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the

> (Clayton) Act .... Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

Jantzen, 386 U.S. at 232, 87 S.Ct. at 1001.There is no analogous provision in the Magnuson-Moss Act.

In fact, if the Finality Act cases are relevant to the instant dispute at all, they provide support for the proposition that Congress did intend the civil penalty provision to be applicable to violations of the mail order rule. In the Finality Act, Congress demonstrated that, if it did not mean for civil penalties to be applicable to FTC action taken before the penalty provision was passed, it was capable of making that intention perfectly clear. The fact that Congress did not include in the Maguson-Moss Act a provision similiar to that found in the Finality Act is some evidence that Congress did not intend for the courts to add such a provision by construction.

In sum, the court concludes that, to the extent Congressional intent is discernible, Congress intended that the FTC could enforce the mail order rule by bringing an action to recover civil penalties for violations. Defendants' motion to dismiss that part of plaintiff's complaint will be denied.

[3] Defendants have also moved to dismiss plaintiff's request to obtain permanent injunctive relief against future violations of the mail order rule. Defendants essentially argue that the FTC is not legally authorized to seek a permanent injunction against rule violations.

It appears, however, that the FTC is authorized to seek permanent injunctive relief, in those cases where it is warranted, under 15 U.S.C. 53(b). That subsection **[25]** provides, *inter alia,* that the FTC may seek a preliminary injunction, pending consideration of a complaint filed before the Commission. The subsection then continues as follows:

> *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

Id. By its terms, that statute appears to give the FTC authority to seek a permanent injunction in all cases in which it believes that it can prove the necessary facts, irrespective of the pendency of an administrative complaint. Three other district courts have so held. *See United States v. National Dynamics Corp.,* 525 F.Supp. 380 (S.D.N.Y. 1981); *FTC v. Virginia Homes Manufacturing Corp.,* 509 F.Supp. 51 (D.Md. 1981), *aff'd,* 661 F.2d 920 (4th Cir. 1981); *FTC v. Singer,* 534 F.Supp. 24 (N.D.Cal. 1981). Defendants' arguments to the contrary are not persuasive.

For the reasons stated above, defendants JS&A and Sugarman's motion to dismiss is denied.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

MILLIKEN & COMPANY, et al.
v.
FEDERAL TRADE COMMISSION, et al.*

Civ. A. No. 79-1991 FTC File No. 99-473

United States District Court, District of Columbia
April 28, 1982

In granting plaintiff's motion for attorney's fees, court held that company was entitled to such fees. The company had substantially prevailed in FOIA action where court had ordered FTC to timely produce sought names of companies who had filed, or failed to file FTC's 1973 Line of Business (LB) Forms. Court asserted that it placed no credibility on FTC's claim that it would have released the information absent the FOIA litigation, since the Commission had acted unreasonably and in bad faith by maintaining the confidentiality of the 1973 data while making similar information for 1974 through 1977 readily available. Even after the agency had adopted new rules concerning such data, it had failed to release requested names until court order compelled it to do so. Despite FTC's holding that as a "large corporate interest," plaintiff should not be afforded attorney's fees, court found that there was no flat rule denying fees to such interests, and while the company was interested in the materials for its own purposes, disclosure brought about by the company served the public interest in the dissemination of the LB data to many other potential users.

Before GREENE, *District Judge.*

MEMORANDUM

On July 31, 1979, Milliken & Company and others (Milliken) brought this Freedom of Information Act action to seek the release from the Federal Trade Commission (FTC) of the names of companies which had filed 1973 Line of Business Forms (LB) as well as of companies which had received orders to file such reports but had not done so. Cross motions for summary judgment were filed in September 1979, devoted to the question whether the reports were exempt from disclosure under 5 U.S.C. § 552(b)(4). On October 31, 1979, the Court was advised that the FTC was considering rules changes which would result in the disclosure of the names sought by Milliken. Various other proceedings ensued (see *infra*), and on April 13, 1981, the Court stayed this action pending the adoption by the FTC of final rules regarding the information at issue. Such rules were, in fact, issued on December 28, 1981, but there was no release of the information to Milliken until after the Court on February 4, 1982, ordered disclosure to be effected within six days. Presently before the Court is Milliken's motion for attorney's fees under 5 U.S.C. § 552(a) (4) (E). The motion will be granted.

First. Milliken has substantially prevailed in this litigation. On February 4, 1982, the Court ordered the release of the information which plaintiffs have sought since the complaint was filed. Further, Milliken is correct in claiming that there appear to be no cases holding that a plaintiff has not "substantially prevailed" where the court ordered the disclosure of all the materials originally sought.

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*Not otherwise reported.

Plaintiffs have also substantially prevailed in a more significant sense. The FTC contends that it was considering confidentiality rules for 1977 in the fall of 1979, and that it decided at that time to expand its consideration to encompass also the 1973 rules at issue here. But the FTC knew all along that the pertinent statutory restrictions had expired two years earlier, and there is no explanation why this topic emerged just about the time of the instant lawsuit. The far more plausible explanation is that the FTC's consideration of the 1973 rules (and its eventual about-face) were caused by this lawsuit, including the motions for summary judgment filed herein about one month prior to the first hint of FTC interest in new rules. It may also be noted that, in response to plaintiff's suggestion that memoranda or employees having knowledge of prior consideration of the proposed rules change be produced, the FTC answered basically only with a claim of privilege. See *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976).

Based upon the chronology of events, and the FTC's posture throughout this litigation, the Court finds not credible the FTC's claim that it would have disclosed the documents at issue here absent this lawsuit. Accordingly, the Court finds that plaintiffs have substantially prevailed.

Second. The FTC acted unreasonably in two respects—it had no substantive basis for withholding the 1973 reports, and it acted procedurally in such a way as to evidence bad faith. There never has been a persuasive explanation as to why the FTC needed to maintain the confidentiality of the 1973 data when similar data for 1974 through 1977 were always made freely available. Although in view of the adoption of the new rules in December 1981, the Court did not have to render a definitive judgment on the issue, it appears from the various legal memoranda and other documents filed in this case that the FTC's substantive defense was always extremely weak and hardly "colorable." This problem was compounded by the agency's manipulations of its rule-making process; by its changes in the ground rules; by unwarranted delays in production of the documents; by the provision of access of allegedly privileged material to its own general counsel while denying such access to Milliken; and by its failure to disclose the data even after the new rules had taken effect until it was explicitly required to do so by an order from this Court.

Third. The FTC argues that Milliken is a "large corporate interest" (Memorandum in Opposition, p. 9) and for that reason should not be afforded attorney's fees. There is no flat rule denying fees to such interests. Milliken did not bring this FOIA action to obtain materials with which to defend against previous improper conduct, for there had been no such conduct in connection with this matter; and it did not seek these materials to resell them or to use them to obtain government contracts or the like. To be sure, Milliken was interested in the materials for its own purposes;[1] but at the same time the disclosure Milliken brought about served the public interest in the dissemination of the LB data to many other potential users. See *FTC's Annual Line of Business Report Program Statement of Purpose,* p. 23 (1973); *Resolution Requiring Annual Line of Business Reports from Corporations,* 39 Fed. Reg. 30970 (1974).

For the reasons stated, it is this 28th day of April, 1982,

ORDERED that plaintiffs' motion for reasonable attorney's fees be and it is hereby granted, and it is further

ORDERED that the amount of such attorney's fees be determined in subsequent proceedings, and it is further

ORDERED that with the exception of the computation of the attorney's fees, this action be and it is hereby dismissed as moot.

ORDER

For the reasons stated in the memorandum filed simultaneously herewith, it is this 28th day of April, 1982,

ORDERED that plaintiffs' motion for reasonable attorney's fees be and it is hereby granted, and it is further

ORDERED that plaintiffs file a petition for the amount of such attorney's fees within twenty days of the date of this Order, and it is further

ORDERED that with the exception of the computation of the attorney's fees, this action be and it is hereby dismissed as moot.

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[1] Milliken orignially sought to obtain the information to persuade the FTC that certain proposed publications were unlawful.

[illegible]

[illegible]

[illegible]

LITTON INDUSTRIES, INC. and LITTON SYSTEMS, INC.
v.
FEDERAL TRADE COMMISSION*

No. 81-7148 FTC Docket No. 9123

United States Court of Appeals, Ninth Circuit
May 3, 1982

1. **Regardless of whether or not FTC agrees with ALJ, Court of Appeals, on review of FTC determination, requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.**

On review of determination of FTC, Court of Appeals requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and this test applies regardless whether the FTC agrees with the administrative law judge.

2. **FTC findings that differ from those of ALJ may be examined more closely by reviewing court.**

A reviewing court may examine FTC's findings more closely where they differ from those of the administrative law judge.

3. **Since deceptive advertising cases necessarily require inference and pragmatic judgment, courts give great weight to FTC's legal conclusions in such cases.**

Courts give great weight to FTC's legal conclusions in deceptive advertising cases, since such cases necessarily require inference and pragmatic judgment.

4. **FTC is not restricted to proscribing only precise misrepresentations that occurred in past advertising.**

Federal Trade Commission is not limited to prohibiting precise advertising misrepresentation that occurred in the past.

5. **Although some vagueness is inherent, FTC orders must be sufficiently precise so as to avoid raising questions concerning their meaning and application, and as specific as circumstances will allow.**

Some vagueness is inherent in FTC orders, but orders should be as specific as circumstances will permit, and orders must be sufficiently precise to avoid raising serious questions as to their meaning and application.

6. **Contentions not timely raised before administrative agency are generally not considered by reviewing court, absent exceptional circumstances.**

Generally, absent exceptional circumstances, reviewing court will not consider contentions not raised before administrative agency at the appropriate time.

7. **Where plaintiff could have appealed the merits to the Commission and obtained judicial review of ALJ's decision but failed to do so, and where FTC and parties had address-**

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*Reported in 676 F.2d 364 (1982). For case before the Commission, see 97 F.T.C. 1; *modified*, 100 F.T.C. 457.

ed the merits only to determine appropriate remedy, plaintiff had waived its contentions on the merits as to whether it had violated the FTCA.

Advertiser waived its contentions on the merits as to whether it violated Federal Trade Commission Act section by failing to raise contentions before FTC, where parties and FTC addressed merits only to determine what sort of remedy was warranted and where advertiser could easily have appealed or cross-appealed to FTC and obtained judicial review of FTC's decision.

8. **FTC, on basis of violations involving one product or a group of products, is empowered to issue orders embracing all products, or all products in a broad category.**

Federal Trade Commission's authority includes power to issue orders encompassing all products or all products in a broad category based on violations involving only single product or group of products.

9. **"Fencing-in" provisions encompassing all products in broad category must be reasonably related to unlawful practices found.**

"Fencing-in" provisions, whereby FTC covers all products in broad category because of violation of Federal Trade Commission Act, must bear reasonable relation to unlawful practices found to exist.

10. **If FTCA violator manufactures only one product but is continually marketing new products that can be introduced comparatively cheaply, issuance of a multiproducts order may be appropriate.**

A multiproducts order by the FTC may be appropriate upon violation of Federal Trade Commission Act even where violator manufactures only one product, if it is continually marketing new products and can introduce them comparatively cheaply.

11. **Since FTC multiproducts orders alter scheme of penalties and enforcement procedures defined by FTCA, they should be used with caution.**

Multiproducts orders of FTC should be used with caution because they alter scheme of penalties and enforcement procedures defined by Federal Trade Commission Act. **[366]**

12. **Where advertiser had ample reason to know that surveys were flawed and disseminated violative advertising nationally over a substantial period of time, and where violation—misuse of survey results—could easily be transferred to other products, limited multiproducts order was appropriate.**

Limited multiproducts order approved by FTC due to micowave oven advertiser's violation of Federal Trade Commission Act was appropriate, where advertisements were disseminated throughout country over substantial period of time, violation was not an isolated instance, advertiser had ample reason to know that its surveys were flawed before it advertised them, and violation could easily be transferred to other products and did not depend upon specific subject matter of any product.

13. **Where the exact violation found concerned only misrepresentations of survey results and nothing in the record related to test results, FTC's multiproducts order proscribing misrepresentations of survey or test results would be modified to delete references to misuse of test results.**

Although FTC was authorized in issuing multiproduct order due to deceptive advertising of microwave ovens where precise violation involved misrepresentation of survey results and nothing in the record related to test results, FTC order would be modified to involve only surveys and not tests.

14. **To provide a fairly clear idea of what was required, term "representative sample" was defined in provision of FTC order prohibiting advertiser from advertising the results of a survey unless respondents were a census or representative sample of population referred to in the advertisement.**

Federal Trade Commission was authorized to prohibit microwave advertiser from advertising results of survey unless respondents were a census or a representative sample of population referred to in the advertisement, where survey of population which had been used by advertiser was neither a census nor a representative sample and the term "representative sample" was defined by FTC in a way which gave advertiser relatively clear idea of what was required.

15. **FTC's expansion of ALJ's order to prohibit misrepresentations concerning "the purpose, sample, content, reliability, results, or conclusions of any survey" was reasonable "fencing-in" provision, even though it was broader than facts of the case.**

Federal Trade Commission's expansion of administrative law judge's order to prohibit misrepresenting "the purpose, sample, content, reliability, results, or conclusions of any survey," although broader than facts of the case, was reasonable "fencing-in" provision.

16. **Requirement that advertiser's surveys be conducted by "persons qualified to do so" was not a highly technical one, was within FTC's authority, and was a reasonable fencing-in provision which explained what had to be done before survey results could be used in advertising.**

Federal Trade Commission was authorized to require that surveys conducted by advertiser be conducted by "persons qualified to do so," as requirement was a reasonable fencing-in provision explaning what had to be done before survey results could be used in advertising and requirement was not a highly technical one.

17. **Advertiser could not object to requirement in ALJ's order on appeal in Court of Appeals that it had not objected to before the FTC.**

Where provision in administrative law judge's order was not objected to by advertiser before FTC, advertiser could not do so in Court of Appeals on appeal.

18. **The terms "reasonable basis" and "representative sample" were sufficiently clear for purposes of FTC order.**

For purposes of FTC order issued against advertiser which was found to have violated Federal Trade Commission Act section, the terms "reasonable basis" and "representative sample" were sufficiently clear.

19. **Only commercial expression that is not misleading and concerns lawful activity is protected.**

Commercial expression is protected only if it concerns lawful activity and is not misleading.

20. If government's interest in regulation is substantial and if regulation is no more extensive than necessary and advances government's interest, even truthful commercial speech can be regulated.

Even truthful commercial speech can be regulated if government's interest in regulation is substantial and if regulation directly advances that interest and is not more extensive than necessary.

21. FTC order, as modified by court to delete unwarranted provision, did not violate First Amendment, since its provisions were reasonably necessary to prevent future violations of the FTCA.

Because provisions in FTC's order were reasonably necessary to prevention of future violations of Federal Trade Commission Act, order, as modified by court to delete unwarranted provision, did not violate First Amendment.

Advertiser sought review of final order of Federal Trade Commission holding that **[365]** certain microwave oven advertisements violated section of Federal Trade Commission Act and ordered advertiser to cease and desist from certain practices. The Court of Appeals, Skopil, Circuit Judge, held that: (1) failure of advertiser to appeal administrative law judge's decision to FTC precluded it from contending on appeal that it had not violated the Act; (2) limited multiproducts order approved by FTC was appropriate; (3) part of order referring to misuse of test results had to be deleted; (4) terms of order were sufficiently clear; (5) portion of order proscribing various types of survey abuses was appropriate; and (6) order did not violate First Amendment.

Order enforced as modified.

(*Syllabus, with substituted captions, taken from 676 F.2d 364*)

J. Wallace Adair, Howrey & Simon, Washington, D.C., for petitioners.

Jerold D. Cummins, Deputy Asst. Gen. Counsel, Washington, D.C., argued, for respondent; *Ernest J. Isenstadt, Howard E.* **[367]** *Shapiro, W. Dennis Cross,* FTC, Washington, D.C., on brief.

Petition for Review of an Order of the Federal Trade Commission.

Before SKOPIL, POOL and CANBY, *Circuit Judges.*

SKOPIL, *Circuit Judge*:

FACTS

Litton Industries, Inc. ("Litton") and Litton Systems, Inc. seek review of a final order of the Federal Trade Commission ("FTC") holding that certain microwave oven advertisements published by Litton Microwave Cooking Products ("LMCP") violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and ordering petitioners to cease and desist from certain practices.

Litton Microwave Cooking Products is a division of Litton Systems. Litton Systems is a wholly-owned subsidiary of Litton Industries. LMCP manufactures and distributes microwave ovens.

Litton disseminated advertisements for microwave ovens from October 1976 to February 1977 and from August through October 1977. The ads were placed in trade and general publications. Local advertisements, based upon copy disseminated by Litton, were placed in 1976 and 1977.

The ads presented results of a survey of "independent microwave oven service technicians" indicating that 76% of the surveyed population "recommend Litton." The ads contained a chart showing percentage preference figures which revealed a strong preference for Litton.

The survey was devised for internal use. After seeing the results, Litton decided to advertise them. The survey was designed to elicit preferences from independent microwave oven service agencies, defined as agencies which serviced one or more brands of microwave ovens but did not sell microwave ovens and were not controlled by a manufacturer. Litton used only its own service agency lists. It had lists of two of its competitors, Sharp and Magic Chef. The survey was to be a census, questioning all independent service agencies, not a sample.

Litton knew that its service agency lists did not include the names of all its service agencies, but only those authorized to do warranty work. This excluded at least 100 agencies. One qualified technician at each agency was surveyed. Litton did not question whether that technician's opinion agreed with the opinions of other technicians at the agency. The Administrative Law Judge ("ALJ") held that Litton knew or should have known that its service agency lists included at least 52 servicing-dealers, and that Litton had reason to know that some of the survey respondents had insufficient experience with other brands to respond accurately.

In December 1976 the Federal Trade Commission questioned the ads. The ALJ held that Litton "showed a certain amount of cooperation with Commission staff in halting the advertisements and revising the copy thereof, [but] their cooperation was far from perfect." Litton published additional ads in January and February 1977 and revised ads from August through October 1977. The revised ads disclosed in very fine print the fact that its surveys included only "Litton-authorized" agencies. Litton continued to cooperate in the cost and dissemination of local ads placed by its dealers from September 1976 through February 1978.

PROCEEDINGS BELOW

In 1979 the FTC issued a complaint charging Litton with unfair and deceptive advertising of microwave ovens. The complaint was later amended to include Litton Systems as a co-respondent. A hearing was conducted before an ALJ. The ALJ held that Litton violated 15 U.S.C. § 45 because it lacked a reasonable basis for making claims about preferences for its microwave ovens. Litton knew that its lists included servicing-dealers; that at least one-sixth of the universe of respondents was not contacted, and that this group might have dif**[368]**ferent preferences; that agencies, not technicians, were surveyed; and that a number of its technicians indicated inadequate experience with other brands to make comparisions. These facts, plus Litton's failure to re-evaluate the surveys before converting them from internal use to advertisements, negated "both the 'reasonableness of the advertiser's action' and its 'good faith'".

The ALJ ordered Litton to cease and desist from making any representation, directly or by implication, about the qualities of its microwave ovens "unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination." He ordered Litton to retain documents used in connection with future market surveys and permit inspection by FTC staff on reasonable notice. The order addressed both Litton Industries and Litton Systems because Litton Industries directly oversaw LCMP's operations and because Litton Systems is a paper entity with no real separate identity.

The ALJ refused to specify a procedure governing conduct of future tests or surveys because such specificity would unduly restrict legitimate comparison advertising and the procedure proposed by the FTC staff ("complaint counsel") was not the best or only way to validate surveys or tests. The order covered only microwave ovens.

Complaint counsel appealed. Litton did not appeal nor cross-appeal. Litton opposed complaint counsel's appeal. Litton stated that the ALJ "reached a result with which respondents do not agree, but which they are willing to accept." It stated that the only possible disagreement was over relief, and the relief ordered by the ALJ "is the type normally considered appropriate by the Commission and the courts in such circumstances." The FTC denied Litton's motion and heard complaint counsel's appeal. Pursuant to 16 C.F.R. § 3.52(b)(3) (1981), complaint counsel specified the issues on appeal as whether the surveys contained more defects than the ALJ found, and whether a broader order was warranted.

The FTC's opinion states: "The principal question in this case, as it reaches the Commission, is what form of order should issue to prevent recurrence of deceptive advertising in which respondents have engaged." The FTC noted that the ALJ's findings "have not been appealed by respondents, and our own review yields no reason to disturb them." Although it was not necessary to decide the point, the FTC questioned the significance of Litton having contacted only one technician in each agency. As to the ALJ's order the FTC stated: "Respondents have not appealed from the order recommended by the ALJ, although they suggest in their Answer Brief to Complaint Counsel's appeal that only a 'narrowed' version of the ALJ's recommended order is appropriate." The FTC held that the ALJ's order, "so far as it goes, is appropriate."

The FTC refused to extend the order that Litton cease and desist from making claims with respect to its microwave ovens without adequate substantiation to all consumer products. It did extend the prohibition on misuse of survey results to all consumer products. The FTC further defined "reasonable basis" and "competent and reliable survey or tests". The FTC added three paragraphs elaborating on the sort of misrepresentations of survey or test results which were prohibited. Litton petitioned for review in this court.

ISSUES

1. Does Litton's failure to appeal the ALJ's opinion and order to the FTC preclude it from doing so in this court?
2. Are the remedial provisions added by the FTC reasonably related to the violations found?

DISCUSSION

I. Standard of Review.

[1, 2] The FTC's findings of fact, "if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). This court requires "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *RSR Corp. v. FTC,* 602 F.2d **[369]** 1317, 1320 (9th Cir. 1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1313, 63 L.Ed.2d 760 (1980) (quoting *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966)). This test applies regardless whether the FTC agrees with the ALJ. *Thiret v. FTC,* 512 F.2d 176, 179 (10th Cir. 1975).A reviewing court may examine the FTC's findings more closely where they differ from those of the ALJ. *Id.; American Cyanamid Co. v. FTC,* 363 F.2d 757, 772-73 (6th Cir. 1966). *See also ITT Continental Baking Co. v. FTC,* 532 F.2d 207, 219 (2d Cir. 1976).

[3] Courts give great weight to the FTC's legal conclusions in deceptive advertising cases, since such cases "necessarily require" 'inference and pragmatic judgment'." *Resort Car Rental System, Inc. v. FTC,* 518 F.2d 962, 963 (9th Cir.), *cert. denied,* 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975) (quoting *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965)).The need for deference results "in part from the statutory scheme and in part from the weight of accumulated agency expertise." *Simeon Management Corp. v. FTC,* 579 F.2d 1137, 1145 (9th Cir. 1978). *See also FTC v. Colgate- Palmolive Co.,* 380 U.S. at 385, 85 S.Ct. at 1042.The statute's general language requires the FTC to apply it to particular situations.Determining whether an advertisement is deceptive draws upon the FTC's familiarity with the public's expectations. *Simeon Management Corp. v. FTC,* 579 F.2d at 1145.

[4, 5] The Commission also possesses expertise regarding what remedy is necessary to eliminate deceptive trade practices. "It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 612-13, 66 S.Ct. 758, 760- 761, 90 L.Ed. 888 (1946). *See Floersheim v. FTC,* 411 F.2d 874, 878 (9th Cir. 1969), *cert. denied,* 396 U.S. 1002, 90 S.Ct. 551, 124 L.Ed. 2d 494 (1970); *Encyclopaedia Britannica, Inc. v. FTC,* 605 F.2d 964, 970 (7th Cir. 1979), *cert. denied,* 445 U.S. 934, 100 S.Ct. 1329, 63 L.Ed.2d 90 (1980); *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950, 98 S.Ct. 1575, 55 L.Ed.2d 800 (1978). The FTC is not limited to prohibiting the precise misrepresentation that occurred in the past. *FTC v. Colgate-Palmolive Co.,* 380 U.S. at 395, 85 S.Ct. at 1048; *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 215 (9th Cir. 1979). Some vagueness is inherent in FTC orders, but the orders should be "as specific as the circumstances will permit." *FTC v. Colgate-Palmolive Co.,* 380 U.S. at 393, 85 S.Ct. at 1047. Orders must be sufficiently precise to "avoid raising serious questions as to their meaning and application." *FTC v. Henry Broch & Co.,* 368 U.S. 360, 367-68, 82 S.Ct. 431, 435-436, 7 L.Ed.2d 353 (1962); *Trans World Accounts, Inc. v. FTC,* 594 F.2d at 216.

II. Failure To Appeal to the FTC.

[6]In general, absent exceptional circumstances, a reviewing court will not consider contentions not raised before the administrative agency at the appropriate time. *See, e.g., United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 36-37, 73 S.Ct. 67, 68-69, 97 L.Ed. 54 (1952); *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs,* 644 F.2d 827, 832 (9th Cir. 1981).

5 U.S.C. § 704 provides that, except as otherwise expressly required by statute, agency action is judicially reviewable absent an appeal to a superior agency authority "unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative". *See also United States v. Consolidated Mines & Smelting Co.,* 455 F.2d 432, 439-40 (9th Cir. 1971); K. Davis, *Administrative Law Treatise* §§ 20.00-3, 20.11 (Supp. 1980).

This court has created additional exceptions where exhaustion of administrative remedies is not statutorily mandated. In determining whether to require exhaustion, this court balances the agency's interest "in applying its expertise, correcting its own errors, making a proper record, enjoy**[370]**ing appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances." *Montgomery v. Rumsfeld,* 572 F.2d 250, 253 (9th Cir. 1978), *quoted in Stratman v. Watt,* 656 F.2d 1321, 1326 (9th Cir. 1981).

No statute expressly requires an appeal to the FTC. Yet it is clear that courts review "the order of the Commission." 15 U.S.C. § 45(c). The ALJ's opinion becomes the decision of the FTC 30 days after service on the parties unless a party appeals to the FTC or the FTC itself decides to review the case. 16 C.F.R. § 3.51(a)(1981).

[7] Balancing the factors here suggests that Litton waived its contentions on the merits by failing to raise them before the FTC. This court defers to the expertise of the FTC, not the ALJ. The FTC has great expertise in determining whether ads are misleading. Permitting judicial review of questions raised before the ALJ but not the FTC could encourage large scale flouting of the administrative process. Permitting judicial review at this stage is not necessary, since Litton could easily have appealed or cross-appealed to the FTC and obtained judicial review of that decision. *See Porter & Dietsch, Inc. v. FTC,* 605 F.2d 294, 306 n.13 (7th Cir. 1979), *cert. denied,* 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980).

Where the agency considered the party's contentions, whether or not procedural rules were strictly followed, this court may consider them. *See Getty Oil Co. v. Andrus,* 607 F.2d 253, 256 (9th Cir. 1979); *Chrysler Corp. v. FTC,* 561 F.2d 357, 364 n.7 (D.C. Cir. 1977). Here the parties and the FTC addressed the merits only to determine what sort of remedy was warranted. Everyone assumed there had been a violation, the gravity of which was disputed.

Because balancing the factors points toward requiring exhaustion, and because Litton did not appeal the merits to the FTC, we do not consider them.

III. The Remedial Order.

Litton contends that the FTC improperly prohibited it from misusing survey results covering all consumer products, rather than just microwave ovens. Litton argues that the other provisions added to the order by the FTC bear no reasonable relationship to the record, and may also violate the first amendment. Litton challenges in particular the extension of the order to cover tests, the requirement that surveys be taken from "a census or a representative sample", the prohibition of misrepresentation of survey and test results and procedures, the requirement that surveys or tests be conducted by "persons qualified to do so" and that any performance characteristics advertised be substantiated. Litton also argues that the terms "reasonable basis" and "representative sample" are unduly vague.

A. Propriety of a multi-products order.

[8,9] The FTC is permitted "to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements." *FTC v. Colgate-Palmolive Co.,* 380 U.S. at 395, 85 S.Ct. at

1048. The FTC's authority includes power to issue orders "encompassing all products or all products in a broad category, based on violations involving only a single product or group of products." *ITT Continental Baking Co. v. FTC,* 532 F.2d at 223 (collecting cases). Coverage of all products in a broad category is a means of "fencing-in" one who has violated the statute. Fencing-in provisions serve to "close all roads to the prohibited goal, so that [the FTC's] order may not be by-passed with impunity." *FTC v. Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952) (footnote omitted). Fencing-in provisions must bear a "reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.,* 380 U.S. at 394-95, 85 S.Ct. at 1047-1048 (footnote omitted).

[10] Because fencing-in provisions are prophylactic, the ultimate question is the likelihood of the petitioner committing the sort of unfair practices they prohibit. Accordingly, "[a]mong the circumstances **[371]**which should be considered in evaluating the relation between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices." *Standard Oil Co. v. FTC,* 577 F.2d 653, 662 (9th Cir. 1978). We also consider whether the violations involved "a technique of deception that easily could be transferred to an advertising campaign for some other product". *Id.* at 663. *Accord, ITT Continental Baking Co. v. FTC,* 532 F.2d at 222. A multi-products order may be appropriate even where a violator manufactures only one product, if it is continually marketing new products and can introduce them comparatively cheaply. *Porter & Dietsch, Inc. v. FTC,* 605 F.2d at 305.

[11] Multi-products orders should be used with caution "because they alter the scheme of penalties and enforcement procedures defined by the Act". *Standard Oil Co. v. FTC,* 577 F.2d at 661. Violations of a cease and desist order are heard in the district courts, rather than before the FTC. A company alleged to have violated such an order is therefore not entitled to a full hearing before the FTC. *Id.* Of course the propriety of a multi-products order "depends upon the specific circumstances of the case". *FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 394, 85 S.Ct. at 1047-1048.

The FTC ordered that Litton:

> in connection with the advertising for sale, sale or distribution of microwave ovens (either for commercial or consumer use) and any other product normally sold to members of the general public for their personal or household use in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:
>
> 1. Misrepresenting in any manner, directly or by implication, the purpose, sample, content, reliability, results, or conclusions of any survey or test.
> 2. Advertising the results of a survey unless the respondents in such survey are a census or a representative sample of the population referred to in the advertisement, directly or by implication. A representative sample need not be a probability sample so long as when the ad is first disseminated respondents have a reasonable basis to expect the sampling method used would not produce biased results.

> 3. Representing, directly or by implication, that experts were surveyed, unless reasonable care was taken to insure that the survey respondents possessed sufficient expertise to qualify as respondents for the survey and to answer the survey questions. For purposes of this order, an 'expert' is an individual, group or institution held out as possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

[12] The FTC held that a multi-products order was appropriate because the violation was not inadvertent, was national in scope, and continued after the ads were questioned by FTC staff. Misuse of survey results "has considerable potential to deceive and is a technique that may be applied to a variety of products." Although Litton does not produce home appliances other than microwave ovens, it has produced other consumer products in the past, the advertising of which "might lend itself to the misuse of test results." Because Litton manufactures few consumer products, the burden of a multi-products order would be small. The FTC conceded that Litton modified its ads "when apprised of their shortcomings" and that the violations here did not "rise to the seriousness of those in [*Sears, Roebuck & Co.*, 95 FTC 406 (1980), *petition for review pending*, No. 80-7368 (9th Cir. argued June 8, 1981)]".

We find the limited multi-products order approved by the FTC appropriate in this case. The multi-products order is actually quite narrow. Except for its reference to tests, discussed below, it refers only to misrepresentation of survey results, the precise [372] violation found here. *See Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1250 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 481, 62 L.Ed.2d 406 (1979). Litton's advertisements were disseminated throughout the country over a substantial period of time. The violation was not an isolated instance. *See id.* Litton had ample reason to know that its surveys were flawed before it advertised them. Its offense was not unintentional. *Compare Chrysler Corp. v. FTC*, 561 F.2d at 364. The violation found here, misuse of survey results, could easily be transferred to other products. It did not depend upon the specific subject matter of any product. *Compare Standard Oil Co. v. FTC, supra*, 577 F.2d at 663 *and Grove Laboratories v. FTC*, 418 F.2d 489, 496-97 (5th Cir. 1969) *and American Home Products Corp. v. FTC*, 402 F.2d 232, 237 (6th Cir. 1968) *with ITT Continental Baking Co. v. FTC*, 532 F.2d at 222-23 & n.24. The relative absence of internal evaluation before advertising tends to show that a broader order overseeing Litton's practices is warranted. *Compare Standard Oil Co. v. FTC*, 577 F.2d at 660, 663 *with Tashof v. FTC*, 437 F.2d 707, 715 (D.C.Cir. 1970). This is not a case where the proscribed practice would be legal in connection with other products nor will this order reach conduct specifically exonerated by the FTC in this proceeding. *Compare National Dairy Products Corp. v. FTC*, 412 F.2d 605, 624 (7th Cir. 1969) *with ITT Continental Baking Co. v. FTC*, 532 F.2d at 222-23 & n.24. Litton's violation was relatively large-scale, not isolated nor unintentional, and easily transferable to other products. There is a reasonable relation between that violation and the order proscribing misuse of survey results regarding other consumer products.

Our decision is not inconsistent with *TRW, Inc. v. FTC,* 647 F.2d 942, 954 (9th Cir. 1981). That case construed section 8 of the Clayton Act, 15 U.S.C. § 19. It did not rely upon cases construing section 5 of the FTC Act, 15 U.S.C. § 45, which gives the FTC broad discretion in eliminating deceptive trade practices. *See, e.g., FTC v. National Lead Co.,* 352 U.S. 419, 428-30, 77 S.Ct. 502, 508-509, 1 L.Ed.2d 438 (1957).

B. Prohibition of misuse of tests.

[13] The FTC added misrepresentations of test as well as survey results to the ALJ's order. The FTC stated that Litton's expert Dr. Wilkie "endorsed the general concept of a prohibition on misrepresentations of survey or test results as a remedy" instead of the provisions proposed by complaint counsel. We have found nothing in the record relating to test results. Tests, which ascertain scientifically product specifications and quality, are different from surveys, which measure popular opinion. Dr. Wilkie endorsed the concept of a general prohibition rather than the specific provisions suggested. He did not suggest inclusion of tests, where tests had not previously been discussed. Accordingly, we will delete that part of the order referring to misuse of test results.

C. Use of representative samples.

[14] The FTC prohibited Litton from advertising the results of a survey unless the respondents were "a census or a representative sample of the population referred to in the advertisement." It defined a representative sample as "a sample that has been selected in a manner which permits projection of results from the sample to the universe from which it is drawn." The FTC added this provision to meet Litton's objection that a "representative sample" might be construed in the strict statistical sense as a "probability sample." The former states a more lenient standard which would "permit Litton to employ, for example, a properly selected 'judgment sample' or 'convenience sample.'"

The provision speaks to one of the forms of misrepresentation found here. The survey population was neither a census nor a representative sample. This provision states the terms on which Litton must conduct surveys in order to use them in advertising. The term "representative sample" is defined in a way which gives Litton a relatively clear idea of what is required. Because it is "as specific as the circum[373]stances will permit," *FTC v. Colgate-Palmolive Co.,* 380 U.S. at 393, 85 S.Ct. at 1047, we will enforce it.

D. Misrepresentation of purpose or sample of surveys.

[15] The FTC expanded the ALJ's order to prohibit misrepresenting "the purpose, sample, content, reliability, results, or conclsuions of any survey or test." This prohibition, although broader than the facts of this case, is a reasonable "fencing-in" provision. Because of the defects in the population chosen and the questions asked, the survey's content was unreliable. The FTC was concerned about knowing misuse of survey data. Its order proscribed various types of survey abuses. Once the order is limited to surveys and excludes tests, it is not overbroad. There is a reasonable relation between this proscribed conduct and the types of misuse of survey results found.

E. Conduct by persons qualified to do so.

[16] Litton objects to the requirement that surveys or tests be conducted by "persons qualified to do so". For reasons already stated, we delete the reference to tests. As to surveys, the provision of the order is reasonable. The FTC added this language "to give greater specificity to the term 'reasonable basis', and not to cast doubt upon the qualifications of those who conducted the Litton surveys in this case." This requirement is a reasonable fencing-in provision which explains what must be done before survey results are used in advertising. The requirement is not a highly technical one. The FTC recognized that "the degree of experience and expertise required of those who design and conduct a survey or test must inevitably depend upon the circumstances and the nature of the survey or test itself."

F. Misrepresentation of performance characteristics.

[17] Litton objects to the requirement that it refrain from representing that its microwave ovens are "able to perform in any respect, or [have] any characteristic, feature, attribute, or benefit" unless it has a reasonable basis for making such a representation. Litton argues that this case involved only surveys and not performance characteristics. This provision was included in the ALJ's order. Litton did not object to it before the FTC. Accordingly, Litton may not do so in this court.

G. Vagueness of reasonable basis and representative sample.

[18] Litton contends that the terms "reasonable basis" and "representative sample" are unduly vague. Litton did not object to the ALJ's use of the term "reasonable basis". The FTC stated that "absolute precision

in this area is not possible, and we note that respondents themselves have not objected to the ALJ's proposed order, which requires only a 'reasonable basis' and is, therefore, even less precise than the order that complaint counsel would impose." The FTC's addition clarifies the meaning of "reasonable basis". The term is as clear as the circumstances will permit and will be enforced. The same is true of "representative sample". It has been defined in a non-technical way and its meaning has been explained. It too is as specific as possible in the circumstances.

H. The order and the first amendment.

[19-21] Commercial expression is protected only if it concerns lawful activity and is not misleading. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). Even truthful commercial speech can be regulated if the government's interest in regulation is substantial and if the regulation directly advances that interest and is not more extensive than necessary. *Id.* "Any remedy formulated by the FTC that is *reasonably necessary* to the prevention of future violations does not impinge upon constitutionally protected commercial speech." *United States v. Reader's Digest Ass'n,* 662 F.2d 955 at 965 (3d Cir. 1981) (emphasis in original). Because the provisions in the FTC's order are reasonably necessary to the prevention [374] of future violations, once the provisions regarding tests are stricken, the order does not violate the first amendment.

CONCLUSION

Litton may not argue that it did not violate 15 U.S.C. § 45. It did not raise this point before the FTC. Balancing the relevant factors suggests that it should not be permitted to do so in this court. The FTC's order is generally a reasonable means of preventing repetition of the violations found. The order is modified to involve only surveys and not tests. The FTC's order is ENFORCED AS MODIFIED.

UNITED STATES
v.
LOUISIANA-PACIFIC CORPORATION*

Civ. No. 81-813-RE FTC Docket No. C-2956

United States District Court, District of Oregon
May 3, 1982

1. **Denial of petition to reopen is reviewable only for an abuse of discretion under APA and "substantial evidence" test should not be used in such cases.**

"Substantial evidence" test should not be used in review of Federal Trade Commission decisions to reopen; those decisions are reviewable only for an abuse of discre[502]tion under provision of the Administrative Procedure Act.

2. **FTC's denial of petition to reopen was neither wrongful nor an abuse of discretion and was supported by substantial evidence in the record, despite respondent's claim that changed economic conditions vitiated economic premises underlying FTC's investigation of merger and subsequent divestiture order.**

Federal Trade Commission's action in rejecting defendant's petition to reopen divestiture order was not wrongful, despite defendant's assertion that the current recession had brought about changes in the timber industry which vitiated the economic premises underlying the FTC's investigation of merger and ensuing divestiture order; there was no abuse of discretion by the FTC and there was substantial evidence in the administrative record to support its decision not to reopen.

The United States brought a civil penalty action seeking an injunction requiring divestiture as well as statutory penalties for defendant's violation of Federal Trade Commission order requiring defendant to divest itself of a manufacturing plant. Defendant filed a counterclaim alleging that the FTC's refusal to reopen the divestiture order was wrongful. On motion of the United States for summary judgment in its favor on the counterclaim, the District Court, Redden, J., held that the FTC's action in rejecting defendant's petition to reopen was not wrongful; there was no abuse of discretion and there was substantial evidence present in the administrative record to support the FTC's action.

Motion granted.

(*Syllabus, with substituted captions, taken from 554 F.Supp. 501.*)

Charles H. Turner, U.S. Atty., *Jack G. Collins,* Asst. U.S. Atty., Portland, Or., *Benjamin P. Schoen,* Consumer Affairs Section, Antitrust Div., Dept. of Justice, Washington, D.C., for plaintiff.

Clifford N. Carlsen, Jr., Michael E. Arthur, Miller, Nash, Yerke, Wiener & Hager, Portland, Or., for defendant.

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*Reported in 554 F.Supp. 501 (1982). For case before the Commission, see 93 F.T.C. 308.

OPINION

Redden, *District Judge:*

In 1978, the Federal Trade Commission (FTC) commenced an investigation of a proposed merger between defendant Louisiana Pacific Corporation (LP), and the Fibreboard Corporation (Fibreboard). Negotiations between the FTC and LP resulted in a settlement of the FTC's objections to the merger, conditioned upon LP's agreement to divest itself of the acquired Rocklin, California, Fibreboard plant within two years.

The settlement was reduced to writing, signed by the parties on July 26, 1978, and was part of the FTC order that became final March 28, 1979. As a result, the FTC terminated its objections, but LP did not divest the Rocklin plant within the two year period. Divestiture has not yet occurred.

The government filed this civil penalty action seeking an injunction requiring the divestiture as well as statutory penalties for LP's violation of the prior order.

I have earlier ruled that the defendant has not complied with the divestiture order as written. The defendant concedes that the ordered divestiture has not occurred, but argues in its counterclaim that the FTC's refusal to re-open the order was wrongful. The government now seeks summary judgment in its favor on that counterclaim.

LP contends that amendments to the Federal Trade Commission Act embodied in Section 2 of Public Law No. 96-252, 94 Stat. 374 (hereafter the "FTC Improvements Act") require that the FTC reopen the divestiture order.

That order is governed by the provisions of 15 U.S.C. 45(b), which allows the FTC to issue cease-and-desist orders. The amendments in question added the following language to 15 U.S.C. § 45(b):

> (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

LP argues that this language *requires* the FTC to re-open the order. Further knowledge of the background is helpful: In February of 1980, roughly one year into the two year divestiture period, LP filed its first petition to re-open the order. That petition was amended by letter in June of 1980. The petition sought an amendment of the order to eliminate the requirement of **[503]** the divestiture. It was denied by the FTC on June 26, 1980. In February of 1981, with roughly one month still to go in the mandated divestiture period, LP filed for an 18 month extension of the divestiture order. The petition was denied in late March. The two year period also expired in March of 1981. Three months later LP again filed a petition to re-open. This petition incorporated the prior petition to re-open and asserted that LP could not divest due to depressed conditions in the timber industry. This last petition to re-open was denied by the FTC on July 31, 1981. The FTC's position was that the depressed conditions cited by LP did not require re-opening.

LP asserts in its counterclaim that the FTC's denial of the petition to re-open was wrongful. I do not agree.

STANDARD OF REVIEW

The FTC asserts that its denial of the petition is reviewable only for abuse of discretion under Section 706(2)(A) of the Administrative Procedure Act (APA). LP contends that the denial is reviewable under the "substantial evidence" standard, citing *McMullen v. INS,* 658 F.2d 1312 (9th Cir. 1981). *McMullen* is not applicable here. In that case an alien sought a stay of deportation under the Refugee Act of 1980 on the ground that he would be subject to persecution because of his political beliefs if he were deported. An immigration judge agreed and entered findings of fact that persecution in Ireland, as a result of the plaintiff's political beliefs, could result. It was also found that the plaintiff was not a security risk to the United States. *Id.* at 1315. The Immigration and Naturalization Service (INS) appealed to the Board of Immigration Appeals (BIA), which reversed. The Ninth Circuit decided that BIA's action was reviewable under the substantial evidence standard, rather than the "abuse of discretion" standard, and reversed the BIA. The decision in *McMullen* is based on certain revisions in the immigration laws: "The new § 243(h) removes the absolute discretion formerly vested with the Board. A factual determination is now required, and the Board must withhold deportation if certain facts exist. This change requires judicial review of the Board's factual findings if the 1980 amendments to § 243(h) are to be given full effect. Agency findings arising from public, record-producing proceedings are normally subject to the substantial-evidence standard of review". *Id.* at 1316.

The present case is not similar to *McMullen*. There, an immigration judge took lengthy and detailed testimony during hearings which included direct and cross-examination. The hearing was to ascertain whether plaintiff could prove the required likelihood of persecution for political beliefs. *Id.* at 1317. This procedure resulted in a transcript of the public hearings and documentary evidence. The substantial evidence test could then be applied to this corpus of proof.

[1] In the present case, by contrast, the FTC's action on a petition to re-open is to examine a statement submitted by the petitioner in order to

determine if it "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified,or set aside, in whole or in part." In its action on the petition for re-opening the FTC essentially assumed the facts asserted therein to be true, and then made the resulting legal determination. Here, then, no evidentiary record is generated, and it would be inappropriate to review for " substantial evidence" when there is no "evidence" before the FTC. I conclude therefore that the "substantial evidence" test should not be used in review of the FTC's decision to re-open. Those decisions are reviewable only under Section 706 of the APA.

However, the standard of review is not crucial here. If I assumed that the facts contained in LP's petition to re-open were true, and considered them to be "evidence" along with the rest of the administrative record, I could apply the "substantial evidence" standard to this controversy. The result would not be different from my review under the "arbitrary and capricious" standard. *See Asarco v. EPA*, 616 F.2d **[504]** 1153, 1161 (9th Cir.1980) ("Arbitrary and capricious" standard applied to EPA requirement that manufacturer install "stack testing facility" in smokestacks; court may not go beyond administrative record).

DISCUSSION

The most recent petition for re-opening filed by LP asserts a number of changed circumstances which LP says require reopening of the divestiture order. Foremost among these is the economic crisis in the timber industry. I accept as true, as did the FTC, the assertion that high interest rates have had a devastating effect on the timber industry. However, the FTC takes the position that the current crisis does not reduce the need for deconcentration in the timber industry. The FTC points out that it has fulfilled its part of the bargain under the settlement agreement and withdrawn its opposition to the LP-Fibreboard merger, which is now an accomplished fact. The FTC also points out that this is a settlement agreement and consent order and that no restrictions were placed upon LP's duty to divest the Rocklin plant. Restrictions, dependent upon the economy, would have been an appropriate subject for negotiation between the parties but are not part of the agreement or consent order signed by the parties. Economic conditions do change in a period of two years, but this fact was obvious when the two year divestiture period was negotiated.

LP asserts that the recession brought about changes in the timber industry which vitiate the economic premises underlying the FTC's investigation of the LP-Fibreboard merger, and the FTC disagrees. These are matters for the discretion of the agency and my review is a narrow one. It is noteworthy that in the settlement agreement LP agreed to waive "... all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered..." While the FTC does not take the position that this language bars the present counterclaim it does assert that many of the arguments are not "new," but were matters known when the settlement agreement was negotiated. The defendant may not use reopening procedures to delay, or to contest the economic wisdom of the settlement agreement which it agreed not to contest. This conclusion is buttressed by language in the legislative history of the 1980 amendments:

> The Committee strongly emphasizes that unmeritorious, time-consuming, and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient... The Commission, to re-emphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

Senate Report No. 96-500, Commerce, Science and Transportation Committee, December 14, 1979, 1980 U.S. Code and Cong. and ADM. News 3, 1073, 1102, 1110-1111.

[2] I conclude that the FTC's action in rejecting the defendant's petition to re-open was not wrongful. There was no abuse of discretion and there was substantial evidence present in the administrative record to support FTC's action.

The plaintiff's motion for summary judgment against the defendant's counterclaim is GRANTED.

JAMES S. PARKER
v.
THE UNITED STATES*

Court of Claims No. 684-81C

United States Court of Claims
May 11, 1982

In an action in which an attorney who had terminated his employment with FTC by voluntary resignation sought reinstatement with back pay and a promotion, court granted government's motion to dismiss for lack of jurisdiction. Although plaintiff resigned because he thought his work situation was intolerable because of FTC's failure to promote him or assign to him work commensurate with his ability, it was irrelevant whether or not he was justified in that belief. Plaintiff had resigned voluntarily and Court of Claims has no jurisdiction in a case of voluntary resignation.

Marc A. Comras, attorney of record, for plaintiff.

Lorraine B. Halloway, with whom was *Assistant Attorney General J. Paul McGrath,* for defendant.

John T. Murphy, Jr., Federal Trade Commission, of counsel.

Before KASHIWA, BENNETT, and SMITH, *Judges.*

ORDER

This case is before us on defendant's motion to dismiss plaintiff's petition. Plaintiff claims back pay and damages resulting from his inability to obtain promotion in, and consequent resignation from, his position as General Attorney, GS-12, with the Boston Regional Office of the Federal Trade Commission (FTC). We hold that the court has no jurisdiction of the case and therefore we grant defendant's motion.

The allegations in the petition, which we take as true for the purposes of this motion only, show that the FTC, while employing plaintiff as an attorney, largely assigned him to clerical and administrative tasks. It also appears that the legal work plaintiff was given was not of the same importance or interest as that assigned to other attorneys in the office. Plaintiff further alleges that his superiors made it clear to him that they did not like him, did not approve of his educational background, had no intention of giving him better work, and did not want to retain him.

Plaintiff assumed his position of General Attorney in 1972, after several years as a Consumer Protection Specialist in the same office. In frustration at the FTC's refusal to promote him and at the type of work he was doing, he resigned on June 30, 1978.[1]

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*Not otherwise reported.

This case is indistinguishable from *Clark v. United States,* Ct. Cl. No. 658-80C (order entered Nov. 6, 1981), which therefore is controlling. We said in that case:

> This court has no jurisdiction to grant back pay and reinstatement to someone who voluntarily terminated his federal employment by resignation. The Back Pay Act, 5 § U.S.C. 5596 (1976), which is the only statute that might authorize such relief (*see Smith v. United States,* 228 Ct. Cl. 168, 171, 654 F.2d 50, 52 (1981)), covers only "an unjustified or unwarranted personnel action." A voluntary resignation is not such an act.
>
> The plaintiff argues, however, that his resignation was not voluntary but was coerced. The "firmly established" principle in this court is that "[t]he element of voluntariness is vitiated only when the resignation is submitted under duress brought on by Government action." *Christie v. United States,* 207 Ct. Cl. 333, 337-38, 518 F.2d 584, 587 (1975). Moreover, "[d]uress is not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one." 207 Ct. Cl. at 338, 518 F.2d at 587.
>
> Under this standard plaintiff has not shown that he was coerced into resigning. The fact that the plaintiff resigned in frustration over his inability to obtain a promotion does not show that his resignation was involuntary. The plaintiff's decision to terminate his employment was a voluntary act brought about by dissatisfaction with his employment situation and not because of pressure the government put on him to resign. Indeed, no one in the government suggested that he should resign. We have held that even resignations submitted to avoid threatened termination for cause were voluntary. *See Christie,* 207 Ct. Cl. at 338-39, 518 F.2d at 588.
>
> *** The government's motive for so treating the plaintiff *** did not change the character of the resignation.
>
> * * * * * * *
>
> *** Since the plaintiff had not stated a claim for reinstatement or back pay within our jurisdiction, *a fortiori,* his claim for promotion to the higher grade to which he asserts he would have been promoted had he not been discriminated against, also fails. *Peters v. United States,* 208 Ct. Cl. at 377, 534 F.2d at 234, and cases there cited. *See also United States v. Testan,* 424 U.S. 392, 402 (1976).
>
> Although the plaintiff believes that he was unjustly denied a promotion, he has not shown the "clear legal entitlement to such promotion" that is the only basis upon which we may order promotions. *Peters,* 208 Ct. Cl. at 377, 534 F.2d at 234.***

Id. at 4-7.

There is little more we can say. Plaintiff resigned because he found his work situation to be intolerable. Whether or not he was justified in that belief is irrelevant; we have no jurisdiction in the case of a voluntary resignation. Further, plaintiff alleges no facts indicating that the FTC *forced* him to resign. Even if his superiors *wished* him to resign, that does not in itself rise to the level of duress.

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[1] As this is a motion to dismiss rather than a motion for summary judgment, we do not rely upon the Standard Form 50 effecting plaintiff's resignation, which plaintiff attached to his brief in opposition to the motion to dismiss. However, as it condenses and clarifies the allegations in the complaint, we set out the relevant portion here.

"I resign for the following reasons

"(1) Lack of advancement.

"(2) Lack of meaningful opportunities to utilize my legal education [,] investigative experience, ability and acumen acquired over the years.

"The effective date of my resignation will be June 31 [sic], 1978.

"[Signed] James S. Parker"

To the extent that plaintiff makes a claim for promotion which is not precluded by the *Clark* case, it must fail on the dual grounds that he alleges no right to promotion to GS-13 (FTC practice or informal policy is not a right), and that in any case he has not pursued, and so *a fortiori* has not exhausted, administrative remedies.

Finally, as plaintiff properly concedes, this court has no jurisdiction of an age discrimination claim. 29 U.S.C. § 633a(c) (1976).

It is therefore ordered, after careful consideration of the parties' submissions and without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

belief is irrelevant: we have no jurisdiction in the case of a voluntary resignation. Further, plaintiff alleges no facts indicating that the CTC forced him to resign. Even if his superiors wanted him to resign, that does not in itself rise to the level of duress.

To the extent that plaintiff makes a claim for payment on which is not precluded by the Clark case, it must fail on the dual grounds that he alleges no right to promotion to GS-13 (CTC practice or informal policy is not a right), and that in any case he has not pursued, and so perforce has not exhausted, administrative remedies.

Finally, as plaintiff's proposed amendment, this court has no jurisdiction of tort claims. 28 U.S.C. § 1491(a)(1) (1994).

On the cross-motions, after careful consideration of the parties' submissions, it is ordered that defendant's motion to dismiss is granted, and the petition is dismissed.

UNITED STATES
v.
DANUBE CARPET MILLS, INC. and Carl D. Hagaman*

Civ. A. No. C78-70R FTC Docket No. C-2303

United States District Court, Northern District of Georgia
May 26, 1982

1. **Since responsibility for testing carpet for flammability under FTC consent order rested on both manufacturer and corporate president, both were liable for payment of civil penalty for selling carpet which failed to meet flammability standard.**

Carpet manufacturer president, who as signatory to consent order was ultimately responsible for testing carpet for flammability, and manufacturer were jointly liable for violation of consent order which prohibited manufacturer and president from selling or introducing into commerce any fabric or related material that failed to conform to carpet flammability standard, and for payment of any monetary penalty set for those violations.

2. **To implement the congressional purpose of FTCA, and to determine the size of civil penalty, specific criteria must be considered.**

Criteria by which to determine size of penalty and to implement congressional purpose of Federal Trade Commission Act are injury to public resulting from violation, defendant's ability to pay penalties, good or bad faith of defendant in violating order, desire to eliminate benefits derived by defendant from violative activities, and necessity of vindicating authority of Federal Trade Commission by deterring similar behavior by others.

3. **Marketing carpet which fails to meet carpet flammability standard subjects purchasing consumers to harm, thereby constituting an unfair method of competition and a deceptive act or practice.**

Receipt by consumers of carpet that does not meet flammability standards under Flammable Fabrics Act causes public harm by subjecting public to unfair method of competition and deceptive act and practice.

4. **Defendants who benefited competitively and financially from sale of untested carpet, and who had no reasonable basis for failing to institute procedures for frequency of carpet testing demonstrated a lack of good faith, and subjected the public to harm; defendants were thus liable for civil penalty for marketing carpet which did not meet Carpet Flammability Standard.**

Corporate manufacturer and president, whose failure to institute sampling plan and guidelines with respect to frequency of testing carpeting for flammability after order became final indicated lack of good faith and subjected public to harm from carpeting that failed to meet standard, who had no basis for failing to test carpet for flammability before manufacturing and selling it, and who benefited competitively and financially from these failures, were liable for penalty of $24,500 for seven violations of consent order which prohibited sale of carpet that failed to conform to Carpet Flammability Standard.

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*Reported in 540 F.Supp. 507 (1982). For case before the Commission, see 81 F.T.C. 611.

5. **Need to impose maximum penalties or injunctive relief were abrogated by defendants' compliance with order and their recently instituted flammability testing program, especially since violations occurred within one style of carpet which had been recalled.**

Corporate manufacturer and its president's compliance with consent order, which prohibited them from selling carpet that failed to conform to Carpet Flammability Standard, following recall of certain carpet style and their recent institution of planned and organized flammability testing program abrogated any need to impose maximum penalties or injunctive relief for consent order violations, especially since all violations of flammability standards occurred within one style of carpet.

Civil penalty action was brought against carpet manufacturer and its presi**[508]**dent for breach of cease and desist order prohibiting manufacturer and its president from selling any carpet which failed to conform to the carpet flammability standard under the Flammable Fabrics Act. The District Court, Harold L. Murphy, J., held that: (1) the United States was entitled to recover civil penalties from carpet manufacturer and its president, who did not test certain style of carpet for flammability prior to manufacturing and selling it, and (2) total monetary penalty of $24,500 was therefore imposed against manufacturer and president jointly.

Penalties imposed.

(Syllabus, with substituted captions, taken from 540 F.Supp. 507)

Benjamin P. Schoen, Atty., Consumer Affairs Section, Antitrust Div., U.S. Dept. of Justice, Washington, D.C., *Curtis E. Anderson,* Asst. U.S. Atty., Atlanta, Ga., for plaintiff.

Richard H. Gimer, Santarelli & Gimer, Washington, D.C., for defendants. **[509]**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAROLD L. MURPHY, *District Judge.*

STATEMENT OF THE CASE

This matter came before the Court on the issue of penalties to be imposed against Danube Carpet Mills, Inc. ("Danube") and its President, Carl D. Hagaman, ("Hagaman") for breach of a cease and desist order issued by the Federal Trade Commission ("FTC") under the Flammable Fabrics Act ("FFA"), 15 U.S.C. § 1191 *et seq.* By orders dated June 29, 1979 and June 18, 1980, this Court earlier determined that Danube and Mr. Hagaman had violated the cease and desist order, and that seven violations had occurred.

This controversy initially began with issuance by the FTC of a draft complaint in which defendants were charged with violating the FFA and § 5(a) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a), by manufacturing a style of carpeting that failed to meet the Carpet Flammability Standard. That dispute ended in the issuance by the FTC of an order to cease and desist with the consents of defendants, which was dated June 22, 1972 and became final on October 13, 1972. The order prohibited defendants from selling, offering for sale, or introducing into commerce any fabric or related material, including carpet, which failed to conform to the Carpet Flammability Standard under the FFA.

Between November, 1974 and March, 1975, The Consumer Product Safety Commission ("CPSC") conducted an investigation of Danube in which a number of rolls of Danube's carpet styles were tested for compliance with the Carpet Flammability Standard. Certain rolls of Brady (foam) carpet manufactured by defendants failed the Carpet Flammability Test.

This civil penalty action was initiated under § 5(a)(1) of the FTCA, 15 U.S.C. 45(a)(1), against Danube and Mr. Hagaman, individually and as an officer of the company. On March 2, 1979, the plaintiff moved this Court for partial summary judgment on the issue of liability, which was granted on June 29, 1979. The parties submitted legal briefs on the question of number of violations in response to this Court's request, and on June 18, 1980, the Court sustained plaintiff's contention that seven violations, one for each failing roll manufactured or sold, occurred. Defendants filed a motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) that was denied on September 22, 1980.

On March 29-30, 1982, the parties appeared before this Court for a hearing upon the issue of penalties. The Court heard evidence and the parties submitted proposed findings of fact and conclusions of law. The Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Danube is a Georgia corporation originally chartered in 1960 under the name of Braids, Inc. Since 1962 Carl D. Hagaman has continuously been Danube's sole owner, principal stockholder, and chief executive officer.

2. Danube manufactures tufted carpet. One line of product is directed at the commercial or contract market. Another line of product is directed at the manufactured housing market. The carpets manufactured by Danube are made primarily from synthetic nylon fibers.

3. Danube presently owns and operates a yarn spinning operation. During the investigation in 1974-75 that led to the complaint in this case, the sole aspect of manufacturing of carpet performed by Danube in its own plant consisted of tufting of the greige goods, i.e., tufting of the face fiber into the primary backing material. The other principal aspects of carpet

manufacture are dyeing the face fiber and applying the secondary backing. As is customary in the carpet industry, particularly for medium and small sized firms, both of these latter functions were performed by commission finishers for defendants in 1974-75.

4. In 1964, Mr. Hagaman hired Charles Housch, a man with significant carpet experience by that time. From 1964-1980, Dan[510]ube was operated primarily by division of responsibilities between Mr. Hagaman and Mr. Housch.

5. Carl D. Hagaman is President of Danube Carpet Mills, Inc., at this time and has held such position with Danube since its purchase by him.

6. Hagaman and Danube are named as respondents in a 1972 Cease and Desist Order, FTC Docket No. C-2303 (Order) and are the same entities now before this Court named as defendants in this action.

7. Danube and Hagaman consented to the entry of the Order which became final on October 13, 1972.

8. Hagaman owns 100 percent of Danube stock.

9. Hagaman was named as a respondent in the Order as President of Danube and individually, signed the Order and was responsible for compliance with the Order individually and in his capacity as chief executive officer of Danube.

10. Danube and Hagaman did not change or increase the frequency with which they tested carpeting for flammability after they signed the Order in 1972.

11. Danube and Hagaman did not change or increase the frequency with which they tested carpeting for flammability after the Consumer Product Safety Commission informed Danube and Hagaman that several rolls of Brady style carpet had failed flammability tests.

12. In the years 1972-1981, there was no written policy or guideline within Danube specifying when and how often to test carpeting for flammability.

13. In the years 1972-1981, Danube and Hagaman did not institute a sampling plan which determined if, when, or how often Danube carpeting would be tested for flammability.

14. The carpet style at issue in this proceeding, Brady, was tufted by Danube at its Ft. Oglethorpe facilities, and was printed and backed by commission finishers in the North Georgia area.

15. Commission finishing houses are recognized and established businesses in the carpet industry, and are relied upon for various aspects of the carpet finishing process by mills of all sizes, including the largest carpet mills. Small mills and many medium size mills depend upon outside commission finishers for the dyeing and finishing of most or all of their carpet products.

16. Danube Carpet Mills selects its commission finishers on the basis of the finishers' reputation for performing particular types of work, and engages in discussions with the commission finishers concerning the finishing process in general, and the specifications for finishing of each carpet style

in particular. These discussions include an exchange of specifications to be used, understandings concerning the amounts and types of latex to be applied, amounts and types of secondary backings, colors, quantities of chemical flame retardants to be added to the latex precoats or adhesives, if any, and other considerations relevant to the manufacturing process. The commission finishers on occasion test the finished goods to determine their compliance with the Carpet Flammability Standard.

17. Danube monitored the performance of the commission finishers employed by it to dye and finish its greige by having its own employees present at the plant of the commission finishers while Danube's goods were being dyed or finished.

18. A carpet, including Brady-style carpet, consists of the face tufted into a primary backing to which a latex precoat or adhesive is first applied, followed by the application of a foam or a jute secondary backing. The face fiber may be dyed at the time the fiber or yarn is produced, or, at some point, after the goods are in greige form.

19.The first step in the carpet manufacturing process is the tufting of dyed or undyed spun yarns into a primary backing. The resulting product is known as greige. Greige is produced as a part of a tufting run, the length of which is a function of the quantity of yarn being tufted and the den[511]sity of the pile. The average tufting run is approximately 6000 linear feet, but it is not unusual to tuft 100,000 pounds of yarn in a single tufting run. Tufting runs are assigned a number for identification purposes.

20. Tufting runs of Brady involved yarn lots of from 20,000-25,000 pounds.

21. The yardage of greige produced in a tufting run is subdivided first into manufacturing rolls, which typically are up to 600 linear feet long.

22. Carpet in greige form is not suitable for sale to consumers insofar as it must be dyed and have a secondary backing applied. For this reason, greige goods are not susceptible of accurate flammability testing in their greige form.

23. Greige is sent to be dyed and finished in the form of manufacturing rolls, or in cuts from such rolls, depending upon a variety of factors, including the type of backing to be applied, the color involved, the amount of orders received, the manufacturers' inventory practices, and the commission house practices with respect to minimum yardage to be finished.

24. Greige rolls have a number assigned to them, and this number is modified as pieces are cut from the manufacturing roll, either for production or for subsequent shipment. After the manufacturing roll is finished, it is subdivided into shipping rolls or pieces and these rolls are assigned new numbers.

25. A carpet consists of yarn, primary backing, latex, and secondary backing. Danube purchases the raw materials used in its carpet from suppliers who produce raw materials and components especially designed

for use in the manufacture of carpet. Brady carpet was manufactured from a good quality, 100% continuous filament heat-set nylon manufactured by DuPont. The yarn was tufted into a primary backing. It was commission-finished by a commission house that performs similar services for other mills in the North Georgia area.

26. Danube relied upon raw materials and component inspection, greige goods inspection, monitoring of commission-finishing operations, and final inspections, together with written and oral understandings with its commission finishers to yield an end product satisfactory to Danube.

27. Danube, like most small mills, does not have in-house equipment capable of performing testing for Carpet Flammability and relies upon flammability tests for its product by other parties.

28. A carpet mill's product line typically consists of a series of styles. Styles may be differentiated by name, construction, fiber type, weight, color line or patterns and dye method. What differentiates one style from another may be structurally significant or it may simply reflect marketing considerations.

29. A style may be kept in a mill's product line for a few weeks or several years. On average, Danube styles remain in the line for no more than a year, with a majority of its styles never reaching production levels in excess of 25,000 linear yards.

30. Carpet yarns receive their color in a variety of ways. Some carpets are produced from pre-dyed yarns which have their color imparted before the greige is ever produced. Other carpets are beck-dyed in greige form, and still others are printed. Danube has employed each of the various types of dyeing methods for its products from time to time, and has sometimes employed a combination of these methods concurrently.

31. Industry practice would recognize use of the same greige goods, dyed or colored by differing dye application methods, with or without a change in style name.

32. During 1973, Danube tufted a quantity of Dupont 100% continuous-filament nylon into greige goods form into a nylon shag carpet with a 12 ounce face-weight. At the time these goods were tufted, they were known by the style name Cason. As originally produced, these materials were finished in solid colors by immersion in a dye beck, to be subsequently sold as Cason. Danube had tested Cason-style carpet for compliance with flammability standards and it met the standard. [512]

33. The opportunity arose to apply the color on the greige using a Stalward printer that gave a different coloring effect. Danube took the Cason greige, finished it utilizing the printer, and in the process changed the name of the finished carpet to Brady.

34. The Cason style and Brady style were identical in all respects except the dyeing application method. Cason was manufactured from greige goods which were beck-dyed while Brady consisted of the identical greige that had its color imparted by a printer.

35. Visual inspection of carpeting cannot reveal whether it meets the standard of flammability.

36. Carpeting is generally tested for flammability according to the color of a carpet because the color of a carpet affects its flammability.

37. Hagaman knew that color affected the flammability characteristics of carpeting.

38. None of the colors of Brady style carpet was tested for flammability.

39. Danube and Hagaman tested Cason style carpet.

40. Brady style carpet had different flammability characteristics from Cason style carpet because it had different colors and a different coloration process than Cason.

41. Hagaman knew that Brady carpet and Cason carpet had different flammability characteristics because the carpets had different colors.

42. Because its colors were different, Brady style carpet was a different carpet from Cason style carpet.

43. Danube and Hagaman manufactured Brady style carpet for sale without any prior testing for flammability.

44. Aluminum Trihydrate (ATH) is the flame retardant generally used by the carpet industry.

45. ATH is mixed into the secondary backing of carpets. The amount of ATH infused into the secondary backing of carpets by a finisher is controlled by the manufacturer of the carpeting.

46. No ATH was put into the backing of Brady style carpet.

47. Danube and Hagaman specified that no ATH be mixed into the foam backing used for Brady style carpet.

48. Approximately fifteen thousand (15,000) square yards of Brady style carpet were manufactured for sale by Danube and Hagaman.

49. Approximately twelve thousand (12,000) square yards of Brady style carpet were sold to consumers.

50. Brady style carpet — 12 ounce shag carpet — was typical of the carpet manufactured by Danube and Hagaman for the manufactured home market.

51. No flammability test on Brady style carpet before it was distributed in commerce was made by the finisher of the carpet at the request or direction of Danube or Hagaman.

52. After notification of test failures and a request by the Consumer Product Safety Commission to recall Brady style carpet, Danube and Hagaman recalled Brady style carpet from its distributors.

53. After notification of several flammability test failures Danube and Hagaman ceased production and sale of Brady style carpet.

54. Had the Consumer Product Safety Commission not tested Brady style carpet and found it failed to meet the Standard for Surface Flammability of Carpets and Rugs, Danube and Hagaman would have continued production and sale of Brady style carpet.

55. There is a competitive cost advantage for companies that test less often than for those that test more often and for those that do not add ATH to the secondary backing applied to carpets than for those that do.

56. In the years 1972-1981, Danube and Hagaman did not keep records of all tests for flammability performed on carpeting they manufactured. **[513]**

57. Danube and Hagaman delegated primary responsibility for flammability testing of Danube carpeting to Charles Housch.

58. Hagaman gave Charles Housch complete discretion to determine if, when, and how often Danube carpeting would be tested.

59. The person now responsible for ensuring Danube carpeting is tested for flammability is Robert ("Bobby") King.

60. Hagaman never showed Robert King a copy of the Order.

61. Danube and Hagaman depended upon the finishers of Danube carpeting for flammability testing and only recently developed a comprehensive testing policy.

62. The only certain way to determine whether a carpet meets the Standard for Surface Flammability of Carpets and Rugs (flammability standard or Standard) is by testing it.

63. At the time this action came to a hearing on the issue of penalties, the day-to-day responsibility for flammability compliance by Danube has been assigned to an official with over 13 years of experience in the general area of three other mills. This individual, Mr. Bobby King, has been given authority to make such improvements on the Danube flammability compliance program as he sees fit. Several changes have been implemented recently and all of the company's styles and colors are now being retested in order to provide a uniform starting point for the current program.

64. The present Danube flammability compliance program consists of testing each color of each style prior to its initial introduction into commerce, testing of each color and the style at intervals not to exceed 50,000 square yards, testing of each style at intervals not to exceed six months (irrespective of yardage produced), the compilation of a log of cumulative yardage produced, and procedures for retesting and problem identification in the event of test failures.

65. Danube now utilizes ATH, or other chemicals recognized as improving the flammability characteristics of carpet, in its styles where use of such components is indicated.

66. Since Brady style carpet failed the flammability test defendants have not been charged with any other violations of the Order.

67. In March 1975, Danube issued a written recall notice to each of its customers of Brady foam-backed carpet. The notice contained the exact language which had been requested by the staff of the Federal Trade Commission.

68. In the fiscal year November 1, 1978, to October 31, 1979, Danube Carpet Mills, Inc., had net profits of $594,684.

69. In the fiscal year November 1, 1979 to October 31, 1980, Danube Carpet Mills, Inc., had net profits of $376,167.

70. For the fiscal years beginning November 1, 1979, and ending October 31, 1981, Danube Carpet Mills, Inc., had net profits of over $1.2 million.

71. As of October 31, 1981, Danube had a net worth of approximately $3.5 million.

CONCLUSIONS OF LAW

1. Pursuant to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), plaintiff United States is entitled to recover civil penalties from the defendants.

2. Under 15 U.S.C. § 45(a)(1), the United States is entitled to receive a civil penalty of up to $10,000 for each violation of the 1972 FTC Cease and Desist Order.

[1] 3. Pursuant to this Court's ruling of June 17, 1980, the defendants committed seven violations of the Order.

4. As President of Danube and as the signatory to the Consent Order, Carl D. Hagaman was ultimately responsible for testing Danube carpets for flammability.

5. Danube and Hagaman are jointly liable for violations of the Order, and for payment of any monetary penalty assessed for those violations.

6. The Flammable Fabrics Act authorizes the issuance of a flammability standard when the Secretary of Commerce finds **[514]** such a standard is needed to "protect the public against unreasonable risk of fire leading to death or personal injury, or significant property damage. . . ." Section 4(a), Flammable Fabrics Act, 15 U.S.C. § 1193(a).

7. A flammability standard must be based on a finding that the standard "is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury or significant property damage [and] is reasonable, technologically practicable and appropriate. . . ." Section 4(b), Flammable Fabrics Act, 15 U.S.C. § 1193(b).

8. The Standard for Surface Flammability of Carpets and Rugs was issued based on the findings enumerated in paragraph 7 above.

[2] 9. The criteria by which to determine the size of a penalty and to implement the Congressional purpose of the FTC Act are: (1) The injury to the public resulting from a violation; (2) the defendant's ability to pay penalties; (3) the good or bad faith of the defendant in violating the order; (4) the desire to eliminate the benefits derived by the defendant from its violative activities; and (5) the necessity of vindicating the authority of the Federal Trade Commission by deterring similar behavior by others. *See, e.g., United States v. Reader's Digest Association, Inc.*, 494 F.Supp. 770 (D.Del.1980), *aff'd.*, 662 F.2d 955 (3rd Cir. 1981), *cert. denied*, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982); *United States v.*

J. B. Williams Co., 498 F.2d 414 (2nd Cir. 1974); *United States v. Papercraft Corp.*, 393 F.Supp. 415, 420 (W.D.Pa.1975), *aff'd in part*, 540 F.2d 131, 141 (3rd Cir. 1976).

10. The receipt by consumers of carpet that does not meet the Standard causes public harm by subjecting the public and consumers to an unreasonable risk of fire leading to death, injury and significant property damage.

11. The receipt by consumers of approximately 12,000 square yards of Brady style carpet caused significant public harm.

12. Pursuant to the Flammable Fabrics Act, section 3(b), 15 U.S.C. § 1192(b), the manufacture for sale and sale of carpet that does not meet the flammability standard is an unfair method of competition and a deceptive act or practice in commerce under the Federal Trade Commission Act.

[3] 13. The receipt by consumers of carpet that does not meet The Standard causes public harm by subjecting the public to an unfair method of competition and a deceptive act and practice. *See United States v. Reader's Digest Association, supra.*

[4] 14. The failure of Danube and Hagaman to institute a sampling plan and guidelines with regard to frequency of testing carpeting for flammability after the Order became final indicates a lack of good faith in complying with the Order and subjected the public to harm from carpeting that failed to meet the Standard.

15. The fact that the "greige" was the same for Brady style and Cason style carpet did not provide Danube and Hagaman with reasonable basis for failing to test Brady style carpet for flammability before manufacturing and selling it, since Brady style and Cason style carpets had different colors and therefore different flammability characteristics.

16. The failure of Danube and Hagaman to test Brady style carpet for flammability prior to manufacturing and selling it indicates a lack of good faith in complying with the Order.

17. The failure of Danube and Hagaman to specify and ensure that a flame retardant was put into the secondary backing of Brady style foam-backed carpet indicates a lack of good faith in complying with the Order, and subjected the public to physical injury and harm.

18. The failure of Danube and Hagaman to keep complete and accurate records of all flammability tests conducted on Danube carpeting indicates a lack of good faith in complying with the Order.

19. The complete delegation of authority with respect to if, when and how often **[515]** Danube carpeting would be tested from Danube and Hagaman to finishers or Mr. Charles Housch indicates a lack of good faith in complying with the Order.

20. The failure of Danube and Hagaman to change, modify, or increase the frequency of testing after the Cease and Desist Order was entered in

1972 until recently indicates a lack of good faith in complying with the Order.

21. Danube and Hagaman benefited competitively and financially from their failure to institute a sampling plan for testing carpet for flammability, failure to specify that ATH be put in the foam backing of Brady carpet, failure to regularly test carpeting for flammability during 1972-1975, and failure to keep complete and accurate records of all tests for flammability.

22. The conduct of each defendant authorizes the imposition of penalties within the limits authorized by law.

[5] 23. Failure to violate the order since the recall of Brady and the recent institution of a planned and organized Flammability Testing Program abrogates any need to impose maximum penalties or injunctive relief.

24. Danube and Hagaman have the ability to pay a monetary penalty of $3,500.00 per violation or a total penalty of $24,500.00.

25. A monetary penalty of $3,500.00 for each of the violations or a total monetary penalty of $24,500.00 against Danube and Hagaman jointly, without the granting of injunctive relief is adequate to serve the purposes of the act under the circumstances of this case and is within the ability of defendants to respond thereto without substantially impairing the solvency of either defendant.

26. The fact that all violations of the flammability standards by defendants occurred within one style of defendants' production militate against the imposition of any penalty greater than that found appropriate by the Court in these findings and against the injunctive relief sought.

ACCORDINGLY, penalties in the amount of $3,500.00 per violation for a total of seven violations amounting to $24,500.00 will be imposed upon the defendants jointly and plaintiff's prayers for injunctive relief are DENIED.

FEDERAL TRADE COMMISSION
v.
DIXIE FINANCE COMPANY, INC., et al.*

Civ. A. No. 82-201 FTC File No. 802 3199

United States District Court, Eastern District of Louisiana
June 14, 1982

In granting FTC's petition for enforcement of CIDs issued in connection with agency's industry-wide investigation of consumer finance companies' credit insurance disclosure practices, Court found that sought information is not immunized from investigation by the "business of insurance" exemption of the McCarran-Ferguson Act. Rejecting respondents' contention that the investigation was an unlawful attempt to investigate and regulate the "business of insurance", Court held that respondents are in the business of extending credit, not insurance coverage. Further, Court noted that the specific conduct being investigated does not relate to respondents as insurers, but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit.

SCHWARTZ, *District Judge.*

This proceeding was invoked by the Federal Trade Commission (Commission) pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. 57b-1[1] for an order compelling respondents to comply with civil investigative demands (CIDs) issued by the Commission during the course of an investigation to determine whether respondents may be or may have been engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2).[2] Specifically, the purpose of the investigation is to determine whether finance companies, automobile dealerships or others may be engaged in unfair or deceptive acts or practices in connection with arranging for or consummating of a consumer credit transaction, including misrepresenting, directly or by implication, that the purchase of credit insurance is a prerequisite to the extension of credit.

Respondents have failed to provide the requested documents on the ground that the Commission's inquiry is an unlawful attempt to investigate and regulate the "business of insurance" which is protected by the

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*Not otherwise reported; *cert. denied,* May 16, 1983.

[1] (e) Whenever any person fails to comply with any civil investigative demand duly served upon him under this Section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

[2] The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce.

McCarran-Ferguson Act, 15 U.S.C. 1012(b)[1] (McCarran Act) from review by the Federal Trade Commission.

Exhaustive briefs were filed by all parties and oral argument was heard, after which this matter was taken under submission by the Court. After a review of the arguments and the memoranda, the Court concludes that the information the Commission seeks is not immunized from investigation by the "business of insurance" exemption of the McCarran Act.

Dixie and TransSouth are consumer finance companies that directly and through corporate affiliates sell life and health and accident insurance to their loan customers. Their position is that any investigation is barred under the McCarran Act since the "sale of insurance incident to a loan transaction is regulated by every state in which Dixie or TransSouth does business." Both companies sell insurance as an incident of their lending activities; both companies allege that since every state in which they sell governs the sale of insurance to borrowers and each state prohibits fraud and deception in any such sale, they clearly fall within the parameters of the McCarran Act exemption. The issue thus becomes whether the actions of the respondents which the Commission seeks to investigate are regulated by state law.

By way of example, the Louisiana Insurance Code, R.S. 22:1211-1217 regulates the trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act; R.S. 22:1214 provides a listing of those methods, acts and practices which are defined as unfair or deceptive. The pertinent provisions for our purposes are R.S. 22:1214(l), (2) and (9) which provide:

> The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
>
> (l) Misrepresentations and false advertising of policy contracts. Making, issuing, or circulating, or causing to be made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class or policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any insurer for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance, or making any representation that the promised coverage is available to groups of persons when such persons do not fall within groups defined in this Code. In case of advertisements of policies providing health, accident, sickness or medical benefits where such policies are either cancellable or renewable at the option of the insurer, such advertisements shall contain a statement to that effect in prominent type, and when details of benefits provided by a particular policy or plan of accident or health insurance are set forth in any advertising material, such advertising material shall disclose the major limitations of such policy or plan as well as the coverage advantage or benefits offered or promised.

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[1] Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance ...

> (2) False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.
>
> (9) Requiring as a condition precedent to lending money upon the security of a mortgage on movable or immovable property that the borrower negotiate any policy of insurance covering such property through a particular insurance agent or agents, company or companies, type of company or types of companies, broker or brokers.
>
> Provided, however, that this provision shall not prevent the exercise by any mortgagee of his right to approve the insurer selected by the borrower on a reasonable non-discriminatory basis related to the solvency of the company and its ability to service the policy. The mortgagee may require that the amount of insurance be at least in an amount to protect the amount of the loan on a type of policy furnishing reasonable protection to the mortgagee in a form selected by the borrower which may include additional coverages not inuring to the benefit of the mortgagee and reasonably associated or connected with the property which is the subject of the loan or mortgage. Notwithstanding the provisions of R.S. 22:1212, any lender either directly or indirectly requiring a borrower to furnish insurance upon such property shall be subject to the conditions and prohibitions of this paragraph.

The Commission has stated that its sole objective in the current inquiry "is to determine whether respondents and other companies engaged in the business of consumer financing may be misrepresenting the optional status of credit insurance to prospective borrowers." The Commission has further stated that it is interested solely in "possible misrepresentations concerning the conditions under which a loan will be granted, and not the actual sale or methods of selling credit insurance." The Commission argues that the "business of insurance" is not involved because an insurance policy is only tangentially involved and that none of the elements of the insurer-insured relationship are being scrutinized by the Commission.

These elements were enunciated in *Group Life & Health Inc. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067 (1979) as the spreading and underwriting of a policyholder's risk and the contract between the insurer and the insured. In applying *Royal Drug,* the focus must be on the particular activity under attack; here, the possible misrepresentation that the purchase of credit insurance is a prerequisite to the extension of credit. There is no argument that the sale of an insurance policy is undoubtedly the "business of insurance" for McCarran Act purposes. *Cody v. Community Loan Corp. of Richmond City.*, 606 F.2d 499 (5th Cir. 1979), *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564 (1969). It is not the actual sale, but the fact that the sale is a precondition to the extension of credit that is critical here. Were the Commission attempting to investigate the *sale* of these policies, clearly the state statutes, such as Louisiana's R.S. 22:1212, would govern and the McCarran Act exemption would apply. But the Commission is not investigating any misrepresentations made in connection with the terms of any policy to be issued; rather, it is concerned with the extension of credit. While the offering of such policies in such a setting may facilitate the sale of insurance policies, that alone does not elevate the activity to the "business of insurance." *Perry v. Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979).

The Fifth Circuit has consistently held, in a somewhat different factual setting, that the lending activities are apart from any insurance activities a company may engage in.[4] In determining whether an insurance activity is involved that will invoke the McCarran Act exemption the Fifth Circuit relied upon the guidance provided by the Supreme Court in *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564 (1969) which stated that the relationship between the insurer and insured, the type of Policy which could be issued, its reliability, interpretation and enforcement are at the core of the "business of insurance."In *Cochran,* supra, the defendant was *not* an insurance company, and the Court found that its activities in financing insurance premiums was not the "business of insurance," since the defendant was only performing the same role that other financing companies did in the consumer sales business. *Cody,* supra, is more on point factually to the situation with which we are faced. In *Cody* a loan corporation offered cancer insurance for sale in its loan offices. The Court acknowledged that the sale of an insurance policy is undoubtedly the "business of insurance" for McCarran Act purposes. However, it further stated that the lending activities of an insurance company are apart from that business: "the financing activity is purely ancillary to the insurance relationship between the insurance company and the policyholder," citing *Perry* supra, at 470.

Applying the analysis established by the Fifth Circuit to the instant case leads us to conclude that the relationship involved between Dixie Finance and TransSouth and its customers which the Commission seeks to investigate is *not* the relationship between insurer and insured. It is the *credit* relationship that the Commission is concerned with; specifically, whether the sale of insurance is a precondition to the arrangement of credit. The "business of insurance" intrudes upon the business of financing only at the point at which the borrower or his lender deal with the insurer regarding the particulars of the policy being purchased. *Peacock Buick, Inc. v. FTC,* 86 F.T.C. 1532 (1975), on reconsideration, 87 F.T.C. 379 (1976), *affirmed Mem.,* 553 F.2d 97 (4th Cir. 1977).

The Specifications set out by the Commission in its CIDs do not intrude on the insurer-insured relationship; they seek to determine only whether respondents may be making false or misleading misrepresentations to prospective borrowers that credit insurance is a prerequisite to the extension of consumer credit. The Commission is not concerned with the "reliability, interpretation and enforcement" of the insurance contract. See *National Securities,* supra.

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[4] *See Cochran v. Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5th Cir. 1979), and *Cody v. Community Loan Corp. of Richmond City.*, 606 F.2d 499 (5th Cir. 1979) which concern premium financing and credit sales of insurance policies.

Respondents rely on interpretations of the insurer-insured relationship by the Second and Ninth Circuits in *Addrisi v. Equitable Life Assurance Society of U.S.,*503 F.2d 725 (9th Cir. 1974) and *Dexter v. Equitable Life Assurance Society of U.S.,* 527 F.2d 233 (2nd Cir. 1975). We feel that these decisions have lost their viability and are distinguishable in light of the Supreme Court's decision in *Royal Drug,* supra, wherein the emphasis was placed on the particular activity being questioned. In both Dexter and Addrisi the practices under attack were being performed by insurance companies and concerned the relationship between the insurer and the policyholder. Were the respondents in this matter insurance companies, the holdings of *Dexter* and *Addrisi* might carry more weight. But under the dictates of *Royal Drug* we are required to limit our determination as to the "business of insurance" to the discrete conduct in question. We conclude that the conduct being investigated does not relate to respondents as insurers, but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the "business of insurance." As so succinctly stated in *Royal Drug,* "the exemption is for the 'business of insurance,' not the 'business of insurers.'"[5]

As we find that the respondents are in the business of extending credit, not insurance coverage, and that the investigation of the sale of any insurance relates to the arrangement of credit between the respondents and prospective borrowers, such sales are subject to inquiry by the Federal Trade Commission to the extent that the inquiry is limited to the Specifications enumerated in the CIDs. The scope of the investigation is not protected by the McCarran-Ferguson Act, since we find that the practices in question induce the purchase of credit and as such are not the "business of insurance" within the meaning of that Act.

As we find that the Commission's investigation is proper under section 5(a) of the FTC Act, 15 U.S.C. 45(a)(2), we do not address respondents' other arguments as to the applicability of the Truth-In-Lending Act, or as to the Commission's right to secure the information it seeks through compulsory process.

Accordingly, it is ordered that Dixie Finance Company and TransSouth produce the documentary evidence as required in the civil investigative demand issued to respondents.

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[5] *Royal Drug,* supra. 440 U.S. at 211, 99 S.Ct. at 1073.

EQUIFAX INC.
v.
FEDERAL TRADE COMMISSION*

No. 81-7169 FTC Docket No. 8954

United States Court of Appeals, Eleventh Circuit
June 18, 1982

1. **If FTC findings are supported by substantial evidence, they are conclusive; and, reasonable inferences drawn from facts based on substantial evidence may also be conclusive.**

Findings of the Federal Trade Commission are conclusive if supported by substantial evidence; additionally, reasonable inferences drawn from facts based upon substantial evidence may support the findings.

2. **Inference chosen by FTC was not discredited by fact that two reasonable inferences could be drawn from the evidence.**

Fact that two reasonable inferences could be drawn from the evidence did not detract from the Federal Trade Commission's decision to choose one of those inferences.

3. **Evidence that fairly detracts from FTC's findings must be taken into account on petition to review an FTC order.**

On petition to review an order of the Federal Trade Commission, the Court of Appeals must take into account evidence that fairly detracts from the Commission's findings.

4. **FTC must ascertain whether procedures employed by preparers of consumer credit reports posed an unreasonable risk of producing error, in determining whether reporting agency violated FCRA by failing to follow "reasonable procedures to assure maximum possible accuracy" of reported information.**

In determining whether a credit reporting agency has violated provision of the Fair Credit Reporting Act requiring the agency, whenever it prepares a consumer report, to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," the essential task of the Federal Trade Commission is to ascertain whether the procedures followed by the agency pose an unreasonable risk of producing error.

5. **FTC finding that agency did not employ "reasonable procedures to assure maximum possible accuracy" of credit reports would be set aside where evidentiary basis was insufficient to support a rational inference that quality control audit procedures used by agency, including the tabulation of adverse information, was likely to result in inaccurate information.**

Evidentiary basis was insufficient to support a rational inference that consumer reporting agency's quality control audit procedures, including the tabulation of adverse information and the agency's challenged use of that tabulation, would likely result in inaccurate information; accordingly, the Federal Trade Commission's finding that the agency failed to use reasonable **[1048]** procedures to assure maximum possible accuracy in its consumer reports, in violation of the Fair Credit Reporting Act, was not based upon reasonable inferences drawn from the record evidence and would be set aside.

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*Reported in 678 F.2d 1047 (1982). For case before the Commission, see 96 F.T.C. 844.

On petition to review an order of the Federal Trade Commission, the Court of Appeals, Vance, Circuit Judge, held that the evidentiary basis was insufficient to support a rational inference that consumer reporting agency's quality control audit procedures, including the tabulation of adverse information and the agency's challenged use of that tabulation, would likely result in inaccurate information; accordingly, the Commission's finding that the agency failed to use reasonable procedures to assure maximum possible accuracy in its consumer reports, in violation of the Fair Credit Reporting Act, was not based upon reasonable inferences drawn from the record evidence and would be set aside.

Order set aside in part.

(Syllabus, with substituted captions, taken from 678 F.2d 1047)

Sutherland, Asbill & Brennan, Carey P. DeDeyn, Atlanta, Ga., *Willis B. Snell, Francis M. Gregory, Jr.,* Washington, D.C., for petitioner.

David C. Shonka, Bruce G. Freedman, Alexandra Buek, Washington, D.C., for respondent.

Before FAY, VANCE and ARNOLD** *Circuit Judges.*

VANCE, *Circuit Judge*:

This is a petition by Equifax Inc. to review a portion of a Final Order to Cease and Desist issued by the Federal Trade Commission on December 15, 1980.[1] The Commission found that Equifax was guilty of six major violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681t. Equifax challenges only one of the Commission's findings: that Equifax failed to use reasonable procedures to assure maximum possible accuracy in its consumer reports in violation of section 607(b) of the FCRA, 15 U.S.C. § 1681e(b).[2]

**Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] The petition is before us for review pursuant to 15 U.S.C. §§ 45(c), 45(d).

[2] In Paragraphs C and D of Section I of its order it enjoined Equifax from taking specified actions to encourage production of adverse information about consumers or to rank its organizational units based on their production of such information. The language of the Order was that Equifax was to cease and desist from:

> C. (1) Rewarding or punishing employees, or representing to employees that they will be rewarded or punished, on the basis of the amount of adverse information (i.e., information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualification for credit, insurance, employment or other benefit, including information which may result, or which may reasonably be expected to result, in a denial of, or increased costs for such benefits) or the proportion, or number, of consumer reports or investigative consumer reports they prepare which contain adverse information about or relating to the consumers who are subjects of said reports; or (2) Encouraging employees, directly or indirectly, to produce a specified number, or proportion, of reports containing adverse information.
>
> D. Using any system of quality audits or any other plan or procedure whereby the performance of branch offices, regions, or other organizational units, or individuals, with respect to the production of adverse information, is ranked against that of other organizational units or individuals, or against previous performance by the same organizational units or individuals.

I. STATUTORY BACKGROUND

The stated purpose of the FCRA is "to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report."[3] Congress [1049] apparently recognized, however, that total accuracy in consumer reports is not a realistic objective. Accordingly, section 607(b) of the FCRA provides:

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

15 U.S.C. § 1681e(b).[4]

FCRA provides for two methods of enforcement: private damage suits brought under sections 616 and 617, 15 U.S.C. §§ 1681n, 1681*o*, and administrative actions under section 621, 15 U.S.C. §§ 1681s. The present proceeding was brought before the Commission under the provisions of section 621(a).[5]

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[3] S.Rep.No. 91-517, 91st Cong., 1st Sess. 1 (1969). FCRA itself contains the following statement of purpose:

> It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681(b). At the same time Congress made clear that FCRA was intended to be a balanced regulatory scheme that recognizes the vital role of consumer reporting agencies. The preceding provision of the same section states:

> The Congress makes the following findings:
>
> (1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
>
> (4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a).

[4] By contrast the Act requires that an agency "maintain strict procedures" for certain reports. 15 U.S.C. § 1681(2). The distinction is clearly not without significance.

[5] Section 621(a) provides:

> Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 45(a) of this title and shall be subject to enforcement by the Federal Trade Commission under section 45(b) of this title with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

15 U.S.C. § 1681s(a).

Administrative enforcement of FCRA is committed to eight other agencies in addition to the Commission.[6] In the discharge of its responsibility the Commission acts in an enforcement role only. Congress has not entrusted the Commission with rule making authority under FCRA.[7]

II. THE ENFORCEMENT PROCEEDINGS

Equifax, which was formerly known as Retail Credit Co., is one of the nation's largest consumer reporting agencies. It has over a thousand offices and sub-offices. During the relevant period it had approximately 4,600 salaried field representatives, **[1050]** and approximately 17,000 customers.[8] It provides over twenty million consumer reports annually. The bulk of those reports concerns applicants for life, health, fire, property and automobile insurance.

The complaint in this case was issued on February 21, 1974 after a nationwide investigation that had lasted over two years. The alleged violations involved in the present petition center around certain aspects of the Equifax quality control program. Specifically, Equifax sampled consumer reports from its branch offices, tabulated the amounts of adverse information and used the tabulation to rank branch offices into upper, middle and lower third positions.

As defined by the Commission adverse information means,

> information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualifications for credit, insurance, employment, or other benefit, including information which may result, or which may be reasonably expected to result, in a denial of or increased costs for such benefits.[9]

The term does not necessarily refer to information that would reflect on the character or morals of an applicant or that would ordinarily be regarded as derogatory. It could, for example, include lack of experience for a job applicant, the presence of youthful drivers in the family of an automobile insurance applicant, a dangerous hobby such as parachuting or scuba diving for a life insurance applicant or obvious overweight of a health insurance applicant.

The FTC alleged that the tabulated rankings were utilized to apply pressure on Equifax field offices to increase their production of adverse information, and that this pressure created an unreasonable risk that Equifax employees would fabricate such information. Evidentiary hearings began on June 30, 1975 and the record was closed on June 15, 1977. Three hundred seventeen witnesses, including two hundred twenty-one present and former Equifax employees, testified and several thousand pages of exhibits were received. The Administrative Law Judge (hereinafter "ALJ") made his initial decision on November 11, 1977, concluding that Equifax violated section 607(b). The findings of the ALJ were summarized by him in part as follows:

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[6] The other agencies identified by the statute are the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the National Credit Union Administration, the Interstate Commerce Commission, the Civil Aeronautics Board and the Secretary of Agriculture. 15 U.S.C. § 1681s(b).

[7] Congress specifically rejected proposals to grant the Commission substantive rulemaking power when the Act was passed in 1970 and in the course of efforts to amend the FCRA in 1973 and 1976. *See* 116 *Cong.Rec.* 36571 (1970) (remarks of Rep. Sullivan) (reporting to the House of Representatives on the conference on S. 823, 91st Cong., 1st Sess. (1969)); S. 1840, 94th Cong., 1st Sess. (1975) (proposing amendment to § 621 to require the Commission to prescribe regulations to carry out the purposes of the Act); S. 2360, 93d Cong., 1st Sess. (1973) (proposing same amendment as S. 1840).

[8] These totals are from 1974.

[9] Commission's Final Order, p. 8, n.9.

> The record does not demonstrate an overall pattern of overt sanctions such as firings or the withholding of salary increases or promotions as penalties for the failure to achieve specific levels of [adverse] information. The pressures as far as can be determined from this record, were generally more subtle: for example, achievement in production of [adverse] information as measured by the audits was one factor considered in connection with managerial incentive bonuses and field representatives put down the objective of achieving particular percentages of [adverse] information on their personal appraisal forms. And, field representatives' performance on the quality audits was one factor among several to be considered in salary recommendations by the branch manager.

(Initial Decision of ALJ, p. 238 (footnotes omitted).

The ALJ also recognized, however, that Equifax's quality control is not limited to the tabulation of adverse information. It also involves the selection and training of its field representatives, and their instructions requiring scrupulous honesty and fairness. Equifax conducts periodic quality audits of each branch office to check performance and the integrity of their reports. In addition to adverse information they also tabulate below standard underwriting (defects in a report's content or completeness) and below standard operating (clerical defects) and offices are also ranked with respect to these deficiencies. The ALJ found that it is Equifax's policy to terminate immediately any representative falsifying information, that this policy is communicated **[1051]** to the field and is generally carried out. Although the ALJ made detailed findings as to ways in which subtle pressure resulted from Equifax's use of its tabulation of adverse information production, he conceded "there is no evidence in the record of a report where adverse information has been falsified." Initial Decision of ALJ, p. 243.

The Commission's decision and final order was issued on December 15, 1980. It rejected certain findings of the ALJ, limited the scope of his order as to others, broadened his order with respect to the questions now before this court and otherwise adopted his decision, findings and conclusions. Notwithstanding the absence of any proof of inaccuracy by Equifax in the production of adverse information, the Commission held:

> A procedure which encourages the production of adverse information is likely to lead employees to prepare their reports in a manner detrimental to the legitimate interest of the

consumers about whom reports are written. This risk was realized in this case. Because we can hardly conclude that procedures which pressure employees to produce adverse information are necessary to the proper operation of consumer reporting agencies, and are unaware of any justification for their use which would outweigh the risks which they pose, we find that they violate Section 607(b).[18]

(footnotes omitted).

III. REVIEW OF THE FTC ORDER

The Commission's holding and the provisions of the order based upon it are attacked by Equifax on three grounds: (1) that there cannot be a section 607(b) violation without proof of inaccuracy, (2) that as interpreted by the Commission section 607(b) is an unconstitutional prior restraint on commercial speech, and (3) that there is no substantial evidence to support the Commission's finding that the Equifax procedure violated the section. Because of our disposition of the case, we find it unnecessary to consider the constitutionality of the Commission's order.

Equifax stoutly maintains that to establish a section 607(b) violation it is essential that inaccuracy be proved. It asserts that every court that has considered the section has held that proof of inaccuracy is the first requisite to proving a violation. *See Bryant v. TRW, Inc.*, 487 F.Supp. 1234 (E.D. Mich.1980); *McPhee v. Chilton Corp.*, 468 F.Supp. 494 (D.Conn. 1978); *Todd v. Associated Credit Bureau Services,* 451 F.Supp. 447 (E.D.Pa. 1977). *aff'd mem.*, 578 F.2d 1376 (3d Cir. 1978), *cert. denied,* 439 U.S. 1068, 99 S.Ct. 834, 59 L.Ed.2d 33 (1979); *Lowry v. Credit Bureau, Inc.*, 444 F.Supp. 541 (N.D.Ga. 1978); *Roseman v. Retail Credit Co.*, 428 F.Supp. 643 (E.D.Pa. 1977); *Pendleton v. Trans Union Systems Corp.*, 76 F.R.D. 192 (E.D.Pa. 1977); *Middlebrooks v. Retail Credit Co.*, 416 F.Supp. 1013 (N.D.Ga. 1976); *Austin v. Bankamerica Service Corp.*, 419 F.Supp. 730 (N.D.Ga. 1974); *Peller v. Retail Credit Co.*, 359 F.Supp. 1235 (N.D.Ga. 1973), *aff'd mem.*, 505 F.2d 733 (5th Cir. 1974).

The Commission responds that these cases were brought by private plaintiffs under FCRA sections 616 and 617 and are inapposite to an enforcement action initiated by the Commission under section 621. It argues that whereas a private plaintiff necessarily must prove injury to recover damages, the Commission may act to enjoin a practice posing a risk of harm to consumers before that harm actually occurs. It says that the meaning and legislative history of the section establish the Commission's prophylactic enforcement role.

For purposes of our initial analysis we assume without deciding that the position of the Commission is correct. In view of our conclusion it is not necessary that we resolve the question.

[1-3] Our review of the Commission's finding that Equifax violated section 607(b) is narrow in scope. The findings of the Commission are con-

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[18] Commission's Final Order, p. 16.

clusive if they are supported by substantial evidence. Additionally, reasonable inferences drawn from facts based upon substantial evidence may sup[1052]port the findings. *See Colonial Stores, Inc. v. FTC*, 450 F.2d 733, 739 & n.13 (5th Cir. 1971). The fact that two reasonable inferences could be drawn from the evidence does not detract from the Commission's decision to choose one of those inferences. *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 266 (5th Cir. 1979); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18, 21 (5th Cir. 1960). We must take into account, however, evidence that fairly detracts from the Commission's findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 337 (5th Cir. 1980).

The posture of the issues in this case is somewhat unusual. The controlling facts are not in serious dispute.[11] The evidence amply supports the Commission's factual findings that Equifax maintains a statistical tabulation of the production of adverse information by its offices, that its methodology is statistically flawed and that it uses such tabulation as a subtle device to encourage production of adverse information. The ALJ and the Commission also found, however, that Equifax strictly enforced a policy against the inaccurate production of adverse information, and that the Commission's survey of Equifax reports revealed that the inaccuracies, if anything, favored the consumer. The question is whether this constitutes substantial evidence of a violation of section 607(b). Phrased another way, do the facts found by the Commission and based upon substantial evidence support a reasonable inference that the quality control system at Equifax is likely to produce error? We conclude that the facts do not support such an inference, and we therefore set aside the challenged portions of the FTC order.

[4] The essential task of the FTC in determining whether a credit reporting agency violated section 607(b) is to ascertain whether the procedures followed by the agency pose an unreasonable risk of producing error. We have specifically reserved the question whether the agency must show that the risk of error manifested itself in concrete instances of detriment to the credit consumer. In this case, however, the FTC attempted mightily to discover whether the quality control procedure resulted in actual inaccuracies. This attempt formed part of an enormous investigation, national in scope, extending over two years with hundreds of witnesses and thousands of pages of documents. The investigation failed to produce any substantial evidence of inaccuracies in the production of adverse information.[12] It is not reasonable to conclude that a procedure which produces no evidence

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[11] The record before us does not contain a complete transcript of testimony or exhibits. We find the Commission's own findings and unchallenged factual assertions of the parties to be sufficient for our decision.

[12] Without disapproving the ALJ's finding, the Commission recited that one witness had given testimony that might be considered contrary. Even if this be considered a finding by the Commission it cannot be considered as substantial evidence in the context of the entire record. *See, e.g., Southland Mower Co. v. CPSC*, 619 F.2d 499, 510-11 & n. 28 (5th Cir. 1980).

of inaccuracy despite the intensive scrutiny of the FTC over a several year period is a procedure that poses an unreasonable risk of inaccuracy.

The analysis of the court in *Firestone Tire & Rubber Co. v. FTC,* 481 F.2d 246 (6th Cir.), *cert. denied,* 414 U.S. 1112, 94 S.Ct. 841, 38 L.Ed.2d 739 (1973), is instructive for our purposes. In that case, the FTC found that the petitioner had engaged in deceptive advertisement. Part of the evidence was a consumer survey showing that 15% of a scientifically selected sample of consumers were misled by the ad in question. The court found that the Commission could reasonably infer under these circumstances that the ad was deceptive.[13] The court **[1053]** cautioned, however, that if the evidence had affirmatively shown that consumers were not misled, the court could not routinely accept the Commission's inference. *Id.* at 249. *See also Boise Cascade Corp. v. FTC,* 637 F.2d 573, 578-80 (9th Cir. 1980) (theory regarding likely effect of pricing policy was not substantial evidence of anticompetitive practice where, *inter alia,* lack of buyer objection to practice indicated that policy did not have anticompetitive effect); *American Optometric Ass'n v. FTC,* 626 F.2d 896, 912-13 (D.C.Cir. 1980) (speculation regarding probable regulatory actions by the States was insufficient basis on which to predicate findings when actual record of state actions might disprove speculation); *Ger-Ro-Mar, Inc. v. FTC,* 518 F.2d 33, 36-38 (2d Cir. 1975) (mathematical extrapolation performed by Commission indicating that marketing plan contained improbable projections was not substantial evidence of deceptive practice where, *inter alia,* Commission's witness testified he was not actually deceived).[14]

It is also noteworthy that the tabulation of adverse information was merely one part of an overall program of quality control which involved personnel selection, training, supervision, review and various other tabulations. There is nothing aberrant about Equifax's concern that adverse information be reported. Its customers want accurate information, to be sure, but it is self evident that their central concern is that they also receive complete information including all adverse information that exists. The quality control procedure also includes unequivocal requirements for fairness and a stringent prohibition against falsification of adverse information, found by the ALJ to be enforced by Equifax. *Cf. Marcus v. FTC,* 354 F.2d 85, 89 (2d Cir. 1965) (scant evidence of mislabeling was insufficient basis on which to predicate findings in light of unrefuted testimony that great care was taken to assure accurate labeling).

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[13] We do not suggest, of course, that the FTC is required to take surveys in order to determine whether consumers were actually misled by advertisements. *See Doherty, Clifford, Steers & Shenfield v. FTC,* 392 F.2d 921, 925 (6th Cir. 1968); *Exposition Press, Inc. v. FTC,* 295 F.2d 869, 872 (2d Cir. 1961), *cert denied,* 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497 (1962).

[14] In its Final Order, the Commission implicitly recognized that the failure of an investigation to yield concrete instances of inaccuracy detracts from a finding that the procedure is likely to result in error:

> We recognize that proof that a challenged procedure has consistently yielded reports free of inaccurate adverse information would shake a claim that a procedure is unreasonable. Similarly, proof that its use has resulted in inaccurate reporting would bolster a claim that is not a "reasonable procedure to assure maximum possible accuracy." *Cf. Bristol-Myers Co.,* 85 F.T.C. 688, 743 n.9, 745 (1975); *Coca-Cola Co.,*83 F.T.C. 746, 809 (1973).

Commission's Final Order, p. 15.

[5] Under the peculiar circumstances of this case, the evidentiary basis is insufficient to support a rational inference that Equifax's quality control audit procedures, including the tabulation of adverse information and Equifax's challenged use of that tabulation, would likely result in inaccurate information. Such an inference can hardly be judged reasonable when it flies squarely in the face of the Commission's own findings.

We hold that Paragraphs C and D of Part I of the Commission's Final Order, the only portion before us for review, is not based upon reasonable inferences drawn from the record evidence and is set aside.

ORDER SET ASIDE IN PART.

[3] Under the particular circumstances of this case, the evidentiary basis is insufficient to support a [illegible] inference that [illegible] quality [illegible] procedures, including the calculation of adverse [illegible] and [illegible] as recalculated [illegible] that calculation, would tend to [illegible] information. Such an inference can hardly be judged reasonable when it flies squarely in the face of the Court's own findings.

We hold that Paragraphs 2 and 3 of Part I of the Commission's Final Order, the only portion before us for review, [illegible] inferences drawn from the record evidence and [illegible].

Order set aside in part.

[illegible]

SEARS, ROEBUCK AND CO.
v.
FEDERAL TRADE COMMISSION*

No. 80-7368 FTC Docket No. 9104

United States Court of Appeals, Ninth Circuit
*June 22, 1982***

1. **FTC is not restricted to issuing a single product order because established violation pertains to a single product.**

Even if Federal Trade Commission establishes a violation of the Federal Trade Commission Act only as to one product, its power is not limited to the issuance of a single product order.

2. **Determination as to whether a reasonable relation exists between circumstances of the case and concern regarding future violations manifested in FTC's order must be made by reviewing court.**

In reviewing order of Federal Trade Commission, court must determine whether there is a reasonable relation between the circumstances of the case and the concern regarding future violations which is manifested by the Commission's order.

3. **Concern with further violations is warranted in an FTC order when a fair assessment of advertiser's conduct indicates a ready willingness to flout the law.**

Where fair assessment of an advertiser's conduct shows a ready willingness to flout the law, sufficient cause for concern regarding further, additional violations exists to warrant Federal Trade Commission order concerning future advertisements.

4. **FTC was not precluded from covering all major home appliances in its order by fact that misleading advertisements related only to dishwashers.**

Fact that advertisements concerning major home appliances which were covered by FTC order were not related to those promoting dishwashers which had been found to be misleading did not preclude the Federal Trade Commission from covering all major home appliances in its order.

5. **A multiproduct order may be justified not only by false advertising of a variety of small items on separate occasions, but by a nationwide, long-term, multimillion dollar false advertising campaign relating to a single high-priced, widely used product as well.**

Extensive and substantial violations of the Federal Trade Commission Act justifying a multiproduct order may include a nationwide, long-term, multimillion dollar false advertising campaign relating to a single widely used, high-cost product as well as the false advertising of a variety of smaller items on a number of separate occasions.

6. **FTC order covering all of manufacturer's major home appliances was not overly broad where owner's manual provided by manufacturer established that the widely-**

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*Reported in 676 F.2d 385 (1982). For case before the Commission, see 95 F.T.C. 406.

**Decided May 6, 1982; as amended on Denial of Rehearing and Rehearing En Banc June 22, 1982.

disseminated central claim of the lengthy, multimillion dollar advertising campaign for the dishwasher was false and that manufacturer knew it was false all along.

In view of evidence that advertising campaign for dishwashers cost $8 million, that it ran for four years, that it appeared in magazines, newspapers, and on television throughout the country, that the campaign's central claim was false, that the manufacturer had no reasonable basis for making the claim, and that the owner's manual furnished by the manufacturer implicitly acknowledged the falsity of the claims and established that the manufacturer knew it was false at all times, multiproduct order isued by the Federal Trade Commission covering all of the manufacturer's major home appliances was not overly broad. **[386]**

7. **A fundamental goal of FTC's remedial function is the prevention of "transfers" of unfair trade practices.**

The prevention of "transfers" of unfair trade practices is a fundamental goal of the Federal Trade Commission's remedial work.

8. **"Performance claims" provision of FTC order is not directed at elements such as price, warranties or endorsements; or at characteristics such as color, components or size.**

For purposes of Federal Trade Commission cease and desist order directed at performance claims by manufacturer of home appliances, characteristics such as color, components, or size are not performance claims, nor are such elements as price, existence of warranties, or existence of certain endorsements.

9. **It may be assumed that there were no violations with respect to the other products for purposes of FTC's "like and related" order, and evidence attesting to this fact need not be admitted since it adds nothing to the proceedings.**

For purposes of a Federal Trade Commission order designed to prevent acts "like and related to" the violation found, it should be assumed that there has been no violations with respect to the other products covered by the order and evidence that such is the case adds nothing to the proceedings and need not be admitted. .

10. **Manufacturer was not unduly burdened by requirements that it maintain material upon which it relied in making claims which are subject to the order and certain contrary material in its possession for a period of three years after it had ceased making the advertising claims.**

Cease and desist order which would require manufacturer to maintain material relied on in making claims which are subject to the order and certain contrary material in its possession for a period of three years after it ceases making the claims in its advertising was not unduly burdensome.

11. **Plaintiff had waived its claim that cease and desist order was an abuse of discretion under the APA and the due process clause, by failing to present claim to the FTC.**

Manufacturer which did not present to the Federal Trade Commission its claim that cease and desist order was an abuse of discretion under the Administrative Procedure Act and the due process clause had waived those issues.

12. **First Amendment was not violated by FTC order directed at manufacturer's advertising claims.**

Order of the Federal Trade Commission directed at manufacturer's advertising claims did not violate the First Amendment.

13. **Multiproduct order was not overbroad under the First Amendment, in light of FTC findings that advertising violations could be repeated and readily transferred to other products.**

In view of Federal Trade Commission's findings that advertising violations of manufacturers could be repeated and could be transferred readily to other products of the manufacturer, order covering all major home appliances of the manufacturer was not overbroad under the First Amendment.

14. **FTC order prohibiting false and unsubstantiated performance claims as to certain specific products was not unconstitutionally vague.**

Cease and desist order of the Federal Trade Commission which forbade false and unsubstantiated performance claims as to certain specific products was not unconstitutinally vague.

Manufacturer sought review of order of the Federal Trade Commission. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) cease and desist order directed towards the product in question and all other major home appliances of the manufacturer was supported by the evidence; (2) order was not overly broad; (3) order was not unconstitutionally vague; (4) order did not violate the First Amendment; and (5) multiproduct order can be justified even when the Federal Trade Commission has found a violation only with respect to a single product.
Order enforced.

J. Blaine Anderson, *Circuit Judge,* dissented and filed opinion.

(Syllabus, with substituted captions, taken from 676 F.2d 385)

Francis R. Kirkham, Richard J. MacLaury, George A. Sears, San Francisco, Cal., for petitioner.
Ernest Isenstadt, F.T.C., Washington, D.C., for respondent.

Before DUNIWAY, ANDERSON and REINHARDT, *Circuit Judges.*

REINHARDT, *Circuit Judge:*

Petitioner Sears, Roebuck and Co. is the largest retailer of general merchandise in the United States. As such, it is also one of the country's largest advertisers. This case presents a number of questions relating to the validity of a multi-product order issued by the Federal Trade Commission (the Commission) as the result of Sears' use of certain unfair and deceptive advertising practices to sell one of the products in the product group. We enforce the order.

I

THE ADVERTISEMENTS AND THE COMMISSION PROCEEDINGS

The material facts are undisputed. In the early 1970's Sears formulated a plan to increase sales of its top of the line "Lady Kenmore" brand dishwasher. The plan did not call for reengineering of the dishwasher [387] or any mechanical improvement. Rather, it contemplated changing the image of the Lady Kenmore, or, in the jargon, it sought a "repositioning" of the machine. The objective was to:

> transform the consumer image [of the Lady Kenmore] from a "price" brand to a superior product at a reasonable price. Eventually, the brand should move from market leadership to market dominance as the market share increases.[1]

To achieve this objective, the company needed a sales strategy. Like any good merchant, Sears knew its market. It knew that a machine that would actually perform the entire job of washing dishes and would eliminate the need for people to pre-rinse and pre-scrape their dishes would attract new customers and command a premium price.[2] It also knew that a machine's ability to clean dishes on the upper rack as thoroughly as those on the bottom rack would be an effective inducement to the consumer.

Acting on this knowledge, Sears prepared advertisements claiming that the Lady Kenmore "completely eliminated" the need for pre-scraping and pre-rinsing, and characterized the machine as the "Freedom Maker." Advertisements stated, *inter alia*:

> SEARS LADY KENMORE. THE DO-IT-ITSELF DISHWASHER. No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan *really* clean. Even baked-on food comes off. And the dishes on top get as clean as those on the bottom.

* * * * * * *

> . . . With a Kenmore you'll never have to scrape or rinse again. Even dishes crusty with leftover food. Kenmore's 14 powerful hot water jets scour every dish clean . . . with no scraping or rinsing.

* * * * * * *

> It's great! You'll like the way it makes pre-rinsing and soaking of heavily soiled dishes, pots and pans a thing of the past.

* * * * * * *

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[1] *Sears, Roebuck and Co.*, 95 F.T.C. 406, 512 (1980), *quoting* a document prepared by Sears' advertising agency.

[2] The Commission describes this as a "common sense" proposition. This is so because dishwashers do not wash dishes completely. Rather, the machines rinse, remove trace elements of dirt from, and dry dishes that have been pre-rinsed and scraped by the person or persons in the home who are willing to undertake, or are assigned, that task. Thus, the washing of dishes is accomplished in part by a person and in part by the machine. The advantage to consumers of a machine which would eliminate the need to pre-rinse and pre-scrape is therefore obvious.

Gets even the messiest baking dishes and roasting pans spotlessly clean . . . without pre-rinsing!

* * * * * * *

Wouldn't the woman in your life love a Kenmore Dishwasher for Mother's Day. A Kenmore dishwasher from Sears means no more dishpan hands, she'll never have to touch dishwater again! Egg, lipstick, peanut butter, jelly, even spaghetti sauce come right off with no pre-rinsing.[3]

Rendered in various forms, these themes appeared in print and electronic advertisements throughout the country over a four year period at a cost to Sears of roughly $8 million. During the first three years of the promotion (1971-1973), Lady Kenmore unit sales rose 300%, from 35,029 units in 1971 to 105,570 units in 1973. These figures represent the Lady Kenmore's rise from only 10% of total Sears dishwasher sales in 1971 to 23% of total Sears' dishwasher sales in 1973. The value of the company's total dishwasher sales rose from $73,470,000 in 1971 to $94,500.000 in 1973.[4]

Unfortunately, the "no scraping, no pre-rinsing" claim was not true. Sears had no **[388]** reasonable basis for asserting the claim, and the instructions in the Owner's Manual which customers received *after* they purchased the dishwasher contradicted the claim. In addition, a 1973 survey conducted for Sears showed that more than half of recent Lady Kenmore purchasers either disagreed, or would not "completely agree" with the proposition that the Lady Kenmore "does not require pre-rinsing."

The Commission began an investigation of the advertisements in July of 1975. A complaint issued on November 20, 1977, charging petitioner and its advertising agency, J. Walter Thompson Co.[5] with disseminating deceptive and unfair advertisements in violation of section 5 of the Federal Trade Commission Act (The Act), codified in part at 15 U.S.C. § 45(a)(1) (1976). The complaint identified Sears' dishwasher claims as:

(1) the Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;

(2) dishes in the top rack of the Lady Kenmore dishwashers will get as clean as those in the bottom rack without prior rinsing or scraping;

(3) the Lady Kenmore "Sani-Wash" cycle, by giving dishes an "extra hot 155 degree final rinse," destroyed all harmful and other bacteria and microorganisms on the dishes and pots and pans.

The complaint averred:

(1) that Sears lacked a reasonable basis for the three advertised claims;

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[3] The record does not reflect whether a comparable advertisement appeared on Father's Day.

[4] At petitioner's suggestion, we do not decide that these advertisements alone caused the sales increase. However, we reject the notion that a 3% increase in national market share (from 26% to 29%) including, *inter alia*, a 300% increase in Lady Kenmore sales is not the "dramatic rise" in sales which the Commission alleges.

[5] Prior to the administrative proceeding, the advertising agency, J. Walter Thompson Co., signed a consent decree and is therefore not a party to this litigation.

(2) that claims (1) and (3) were false;
(3) that advertising demonstrations purporting to prove claim (1) were false and deceptive; and
(4) that the Owner's Manual instructions provided with each dishwasher contradicted claim (1), and were material and that claim (1) was deceptive and unfair since the advertising did not reveal the instructions.[6]

After extensive administrative proceedings, the administrative law judge (ALJ) made elaborate findings of fact and held Sears liable on all charges in the complaint. He entered a proposed order. The company appealed.

Before the Commission, Sears challenged a single element of the liability finding—the "Sani-Wash" issue—and several aspects of the remedial order. It did not dispute the ALJ's findings (1) that the no pre-rinsing or scraping claim was false and unsubstantiated; (2) that the "upper rack gets as clean as those on the bottom rack" claim was unsubstantiated; (3) that demonstrations purporting to prove these cleaning claims were false; (4) that its own tests showed a need for pre-scraping and rinsing and that its surveys showed that consumers found it necessary to pre-scrape and rinse; and (5) that the Owner's Manual provided with each dishwasher contradicted the advertisements. Nor did Sears contest the order's provisions covering these findings. It did quarrel with (1) the liability finding on the "Sani-Wash" issue, (2) the prior substantiation element of the recommended order, (3) the order's coverage of products other than dishwashers, including the proscription against false and unsubstantiated performance claims, and (4) language in the record keeping section of the order. **[389]**

The Commission issued its opinion and final order on April 29, 1980. It vacated liability as to misrepresentation of the Lady Kenmore's sanitizing qualities.[7] On the remedy issues, it narrowed the definition of the order's term "major home appliances,"[8] and deleted a phrase in the record keeping section.[9] On the other remedy issues: prior substantiation, product coverage, and the remaining record keeping questions, it affirmed unanimously.

The final order requires Sears to cease and desist from making the "no pre-rinsing or scraping" and "top rack as clean as the bottom rack" claims. It also prevents Sears from (1) making any "performance claims" for "major home appliances" without first possessing a reasonable basis consisting of "[c]ompetent and reliable tests" or other evidence that substantiates such claims; (2) misrepresenting any test, survey or demonstration regarding "major home appliances" and (3) making any advertising statements not consistent with statements in post-purchase materials supplied to purchasers of "major home appliances." The record keeping section requires Sears to maintain certain written records for a period of three years after the last dissemination of any actual advertisements.[10]

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[6] Sears answered on January 19, 1978. It denied most of the substantive allegations and raised four affirmative defenses:

1. that it had abandoned the challenged practices;
2. that the challenged practices were industry-wide;
3. that the challenged advertisements were insignificant; and
4. that the ads did not require prior substantiation because they caused no material adverse effect upon consumer health or safety.

Contention 1 has been firmly rejected as a defense by those courts considering it. *See Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976) (collecting cases).

[7] Accordingly, there is no issue relating to liability before us. We are concerned solely with issues relating to remedy.

[8] The Commission removed the phrase "and any other product that falls into the category of major home appliances" from the definition of major home appliances thereby limiting the term to 14 particular products. *See* n.25 for the revised definition. As we conclude in Section II, subsection C, *infra*, the Commission properly characterized these 14 products as "major home appliances."

[9] It amended the phrase "all matter in [Sears] possession" to include only retention of applicable "test reports, studies, surveys or demonstrations. . . ."

We think it appropriate here to clarify the arguments that Sears does *not* make on this appeal. First, it does not challenge any [390] part of the order as it applies to dishwashers. It therefore accepts the prior reasonable substantiation and performance claim concepts insofar as they relate to dishwashers.

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[10] The final order, *Sears, Roebuck and Co.*, 95 F.T.C. at 524-27, provides *inter alia:*

I.

It Is Ordered, That for purposes of this order the following definitions shall apply:

1. "Major home appliance" means air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, ranges, stoves, ovens (including microwave ovens), humidifiers, and dehumidifiers [sic] [See 95 F.T.C. 824.].

2. "Competent and reliable test" means a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner, using test procedures that insure accurate and reliable results. Such tests must be truly and fully representative of expectable consumer usage.

II.

It Is Further Ordered, That Sears, Roebuck and Co., a corporation, its successors and assigns, in connection with the advertising, offering for sale, sale or distribution of dishwashers, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any Sears dishwasher will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

2. Representing, directly or by implication, that dishes in the top rack of any Sears dishwasher will get as clean as those on the bottom rack without prior rinsing or scraping.

It shall be an affirmative defense to a compliance action brought under the preceding paragraphs for Sears, Roebuck and Co. to establish that the representation is truthful.

III.

It Is Further Ordered, That Sears, Roebuck and Co., . . . in connection with the advertising, offering for sale, or sale or distribution of "major home appliances," in or affecting commerce . . . do forthwith cease and desist from:

1. Making any statements or representations, directly or by implication, concerning the performance of such products unless such statements or representations are true and unless, at the time the statements or representations are made, Sears, Roebuck and Co., possesses and relies on a reasonable basis for such statements or representations, which shall consist of competent and reliable tests, or other competent and reliable evidence which substantiates such statements or representations.

2. Misrepresenting in connection with the advertisement of any such products or in any other manner, directly or by implication, the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research.

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such products which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchasers of such products.

IV.

It Is Further Ordered, That Sears, Roebuck and Co., . . . in connection with the advertising, offering for sale, sale or distribution of dishwashers or other "major home appliances," in or affecting commerce. . . . shall maintain written records:

1. Of all materials that were relied upon in making any claim or representation in advertising sales materials, promotional materials, or post purchase materials, concerning the performance characteristics of any of Sears, Roebuck and Co.'s dishwashers or other major home appliances:

2. Of all test reports, studies, surveys, or demonstrations in their possession that contradict, qualify, or call into question any claim or representation in advertising, sales materials, promotional materials, or post purchase materials disseminated by Sears, Roebuck and Co., or by any advertising agency on behalf of . . . Sears, Roebuck and Co.'s dishwashers or other major home appliances.

Such records shall be retained by Sears, Roebuck and Co. for a period of three years from the date such advertising, sales materials, promotional materials, or post purchase materials were last disseminated. . . .

Second, it does not attack the order's coverage of products other than dishwashers on any ground not set out in this opinion. For example, it does not question subparagraphs (2) & (3) of paragraphs III of the order except insofar as it attacks the rationality or overbreadth of the entire paragraph and except insofar as it complains of subparagraph (2)'s uncertainty. Third, it does not challenge the proscription of false and unsubstantiated "performance claims" as unreasonable *per se,* but objects only to the inclusion of such a proscription in the multi-product order before us.

Among the facts found by the administrative law judge and affirmed by the Commission, we attach particular importance to the following:

1. that the no scraping, no pre-rinse claim was not true when first made and remained untrue until discontinued four years later;[11]

2. that Sears lacked a reasonable basis for that claim at any time during the four year promotion;

3. that the tests relied on by Sears indicated the falsity of the no scraping, no pre-rinse claim;

4. that the Owner's Manual provided by Sears with each machine explicitly advised purchasers to pre-soak or "lightly" scour certain dishes thereby directly contradicting the advertisements; and

5. that the advertising campaign here was national in scope, was conducted over a period of at least four years, and carried a price tag of $8 million.

II

STATUTORY POWER AND THE RATIONALITY OF THE REMEDY

1. *Statutory Power*

[1] Sears argues first that the language and legislative history of section 5(b) of the Act, 15 U.S.C. § 45(b), require the Commission to direct its cease and desist orders only to those specific violations alleged in the complaint since only those violations have been litigated in the manner contemplated by the statute.[12] From this doctrine, Sears seems to reason that since the complaint here describes dishwasher advertising, the Commission lacks the power to **[391]** issue an order covering any product except dishwashers. Sears' conclusion is that to the extent that the order covers products other than dishwashers, it is invalid as a matter of law. We disagree.

It is too late to argue that when the Commission establishes a violation only as to one product, its power under the Act is limited to the issuance of a single product order. As the Second Circuit said in *ITT Continental Baking Co. v. FTC,* 532 F.2d 207, 223 (2d Cir. 1976), "[C]ourts have often upheld FTC orders encompassing all products or all products in a broad category, based on violations involving only a single product or group of products . . . ." (Citations omitted). The Supreme Court rendered this doctrine metaphorically in *FTC v. National Lead Co.,* 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957). There, the Court reminded the companies that objected, *inter alia,* to the breadth of the Commission's order that "those caught violating the Act must expect some *fencing in*" *Id.* at 431, 77 S.Ct. at 508. (Citation omitted) (emphasis added). Allowance of this "fencing in" authority is based in part on our deference to the FTC's accumulated expertise in striking the proper relationship between violations found and effective orders, *Simeon Management Corp. v. FTC,* 579 F.2d 1137, 1145 (9th Cir. 1978), and in part on necessity since "there is no limit to human inventiveness in this field." H.R.Conf.Rep.No. 1142, 63d Cong., 2d Sess., 19 (1914), *quoted in FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 240, 92 S.Ct. 898, 903, 31 L.Ed.2d 170 (1972).

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[11] Although the truth of the "top rack gets as clean as the bottom rank" claim was not decided below, test results submitted by Sears showed that, contrary to the advertisement, the bottom rack "got cleaner" than the top rack.

[12] The outline of Commission procedures is codified at 15 U.S.C. § 45(b).

Accordingly, we reject Sears' argument here.

2. *Rationality of the Remedy*

Sears' next argument can be separated into three elements. First, the company says there is no reasonable relationship between the multi-product portion of the order and the violation found; second, that a multi-product order covering "performance claims" is unreasonably broad; and third, that this order must be limited to dishwashers because the ALJ excluded evidence regarding petitioner's advertising of other major home appliances.

A. *The First Two Elements: The Specific Violation, Performance Claims, and the Multi-Product Order*

[2] The general principles governing objections to FTC orders are well known.

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13, 66 S.Ct. 758, 760, 90 L.Ed. 888 (1946).

In addition,

> Congress has placed the primary responsibility for fashioning orders on the Commission. *Federal Trade Comm'n v. National Lead Co.,* 352 U.S. 419, 429 [77 S.Ct. 502, 509, 1 L.Ed.2d 438]. For these reasons the courts should not "lightly modify" the Commission's orders. *Federal Trade Comm'n v. Cement Institute,* 333 U.S. 683, 726 [68 S.Ct. 793, 815, 92 L.Ed. 1010]. However, this Court has also warned that an order's prohibitions "should be clear and precise in order that they may be understood by those against whom they are directed," *Federal Trade Comm'n v. Cement Institute, supra,* at 726 [68 S.Ct. at 815] . . . .

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392, 85 S.Ct. 1035, 1046, 13 L.Ed.2d 904 (1965).

A judgment regarding "reasonable relation" in multi-product order cases "depends upon the specific circumstances of the case." *Id.* at 394, 85 S.Ct. at 1047. "[T]he ultimate question is the likelihood of the petitioner committing the sort of unfair practices [the order] prohibit[s]," *Litton Industries, Inc. v. FTC,* 676 F.2d 364 (9th Cir. 1982). We answer that question by first examining the specific circumstances present in a particular case. Then, giving due deference to the Commission's expertise **[392]** and judgment, we determine whether there is a "reasonable relation" between those circumstances and the concern regarding future violations manifested by the Commission's order.

[3] Where a fair assessment of an advertiser's conduct shows a ready willingness to flout the law, sufficient cause for concern regarding further, additional violations exists. Two factors or elements frequently influence our decision—the deliberateness and seriousness of the present violation, and the violator's past record with respect to unfair advertising practices. *Standard Oil Co. of California v. FTC,* 577 F.2d 653, 662 (9th Cir. 1978).[11] Other circumstances may be weighed, including the adaptability or transferability of the unfair practice to other products. *See Colgate-Palmolive Co.,* 380 U.S. at 395, 85 S.Ct. at 1047. The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor. *See Porter & Dietsch, Inc. v. FTC,* 605 F.2d 294, 304-05 (7th Cir. 1979), *cert. denied,* 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980); *Jay Norris, Inc. v. FTC,* 598 F.2d 1244, 1250 (2d Cir.), *cert. denied,* 444 U.S. 980, 100 S.Ct. 481, 62 L.Ed.2d 406 (1979).

For its first point—the impropriety of a multi-product order based on this violation—Sears relies primarily on *American Home Products Corp. v. FTC,* 402 F.2d 232 (6th Cir. 1968). There, reviewing a proceeding relating to the effects of a single ointment, the court struck as unreasonable that part of an order which prevented the company from misrepresenting the "efficacy" of "any drug." *Id.* at 237. The case is not persuasive authority here for two reasons. First, the "major home appliances" category, as defined in the order before us, is far more limited and precise than the "any drug" category. Second, the *Home Products* court's rationale was simply that since the violation involved only one ointment and "no other drug was involved," a multi-product order was unreasonable. *Id.* Since *Home Products,* however, courts have regularly refused to follow such reasoning and have approved multi-product orders despite the fact that those violations found involved only a single product. *See, e.g., ITT Continental Baking Co. v. FTC,* 532 F.2d at 223 (collecting cases).[14]

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[11] The *Standard Oil* court distilled these factors from *FTC v. National Lead Co.,* 352 U.S. at 429-30, 77 S.Ct. at 509.

[4] In addition, Sears states that advertisements concerning the other covered products, *e.g.,* microwave ovens and trash compactors, are *never* related to those promoting dishwashers since dishwashers do not perform work similar to the work performed by microwave ovens or trash compactors, and that, therefore, an order covering these functionally unrelated machines is inherently unreasonable. This argument misses the fundamental point that the Commission is concerned not with how machines work, but with how machines are sold. Thus, the correct question is not whether the machines function in similar ways but whether the machines could be sold with similar techniques. We address that question *post* at 394-395.

For its second contention in this section of the argument—that a multi-product order containing a "performance claim" provision is unreasonably broad—Sears relies primarily on *Fedders Corp. v. FTC,* 529 F.2d **[393]** 1398 (2d Cir.), *cert. denied,* 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976). While *Fedders* did not involve a multi-product order, it did involve an *implied* performance claim. The company advertised its air conditioners as "unique" because of an alleged "reserve cooling power." The Commission found that the "reserve cooling power" claim constituted implicit misrepresentation. The company did not dispute its liability for the misrepresentation, or the provisions of the order covering "uniqueness" claims. The question it brought before the Second Circuit was whether the Commission's order could cover claims for "performance characteristics" of air conditioners when the only claims found false below had been "uniqueness" claims. Basically, the argument was that a "performance" claim was not sufficiently "like and related" to a uniqueness claim to come within the Commission's *Mandel Brothers* authority. *See FTC v. Mandel Brothers,* 359 U.S. 385, 392-93, 79 S.Ct. 818, 824, 3 L.Ed.2d 893 (1959).

Rejecting this argument, and affirming the Commission's order, the court not only held that the "uniqueness" claim was like and related to a performance claim, but that such a claim was a "performance claim by implication" since it "implicated the basic performance characteristics of the entire product." *Fedders,* 529 F.2d at 1403. The court then upheld the Commission's order and expressed approval of the fact that the Commission had limited the ALJ's proscription of unsubstantiated performance claims.[15] Sears asserts that under *Fedders* a more limited proscription of performance claims is required here.

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[14] The *Home Products* court also found that the order's effect there was "to admonish petitioner not to violate the law again," and was therefore improper. *Id.* at 237. An order which had the effect ascribed by the *Home Products* court to the order before it would be overbroad. *See e.g., Standard Oil Co. of California v. FTC,* 577 F.2d at 661; *see generally, FTC v. Henry Broch & Co.,* 368 U.S. 360, 367-68, 82 S.Ct. 431, 435-36, 7 L.Ed.2d 353 (1962); *FTC v. Ruberoid Co.,* 343 U.S. 470, 487, 72 S.Ct. 800, 810, 96 L.Ed. 1081 (1953) (Jackson, J., dissenting). We need not comment on whether we would have characterized the *Home Product* order in the same way the court there did, we need only say that the order before us does not have that effect.

[15] The FTC limited the order to performance characteristics relating to 'cooling, dehumidification, or circulation characteristics, capacity or capability . . . .' *Id.* at 1403, *quoting from* the Commission's opinion.

A look at "the specific circumstances" in *Fedders* and in this case demonstrates two basic differences which bear significantly upon the appropriateness of the remedy. First, there is a difference between a relative performance claim, *e.g.*, the "uniqueness" claim of "ours is better than any other"—and an absolute performance claim,—"*e.g.*, dishes do not need to be pre-rinsed or scraped." Unlike the advertising in the case before us, the emphasis and thrust of the *Fedders* advertising involved a matter of degree. The manufacturer there claimed that its machines cooled the air under more adverse climatic conditions than machines manufactured by others. Second, there is a difference between an implied performance claim and an express one. In *Fedders* the court labeled the claim "a vague design claim" and an "implicit misrepresentation." *Id.* at 1403. Here the claim is clear, direct, unqualified, and explicit. The more clear and direct the statement, the more likely it is to bring about the intended result, and the larger the number of consumers likely to be misled. The violation in the case before us is far more serious in every respect than was the *Fedders* offense.[16]

A more pertinent case is *Jay Norris, Inc. v. FTC,* 598 F.2d 1244 (2d Cir.), *cert. denied,* 444 U.S. 980, 100 S.Ct. 481, 62 L.Ed.2d 406 (1979), where the Commission's order required prior substantiation of safety *and* performance claims of *all* of the mail order company's products, requirements far broader than those contested here or in *Fedders.* Approving the reasonableness of the *Jay Norris* order, Judge Oakes, the *Fedders* author, reasoned that it covered "*only* safety and performance" representations, *id.* at 1250 (emphasis added), which the record showed were product characteristics which the Norris company was "wont to exaggerate." *Id.* Rejecting Norris' breadth and vagueness challenges, the court relied on the Commission's "like and related" *Mandel Brothers* authority and the ex**[394]**tent and substantial nature of the misrepresentations. On those bases, the court upheld an order prohibiting false and unsubstantiated performance claims covering *all* products. Thus the thrust of Second Circuit law on this issue is against Sears' position.

[5] Sears dismisses *Jay Norris* as a case applicable only to companies operating "'on the fringe of business racketeering.'" We do not agree. We think its rationale applies to a broader range of cases in which extensive and substantial violations of the law are found, not just to cases involving near racketeers. Extensive and substantial violations justifying a multi-product order may include a nationwide, long-term, multi-million dollar false advertising campaign relating to a single widely used high-cost product as well as the false advertising of a variety of smaller items on a number of separate occasions. Seventh Circuit law also emphasizes the element of

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[16] We do not suggest that there is a clear-cut line between relative and absolute or implied and express performance claims nor any rigid rules applicable to those various categories of performance claims. Certain relative claims may contain absolute phrases. For example, the Fedders Company justified its "uniqueness" claim by the absolute claim of "reserve cooling power." These distinctions are merely suggestive of considerations which may, along with a number of others, affect the reasonableness of the remedy in particular cases.

the extent and substantiality of the misrepresentation. *Porter & Dietsch, Inc. v. FTC,* 605 F.2d at 304-05.

[6] We now consider the Commission's order in light of the specific circumstances of this case. This advertising campaign cost $8 million, ran for four years, and appeared in magazines, newspapers and on television throughout the country. The Commission found, and Sears does not dispute, that the campaign's central claim was false. Sears had no reasonable basis for making the claim, and the tests which Sears purportedly relied on showed, if anything, that the claim was false. Moreover, the Owner's Manual which Sears furnished its customers after they purchased the Lady Kenmore, implicitly acknowledged the falsity of the claim and establishes that Sears knew it was false at all times. Under these circumstances, Sears' advertising campaign demonstrates "blatant and utter disregard" for the law. *Standard Oil,* 577 F.2d at 662.[17] The Commission also considered petitioner's compliance record and concluded that it was "a wash." *Sears, Roebuck and Co.,* 95 F.T.C. 406, 517 and 518 n.10 (1980). We see no reason to find otherwise.

Sears' advertisements were no accident or "isolated instance." *Jay Norris,* 598 F.2d at 1250. Rather, they were part of an advertising strategy, with attendant slogans, adopted without regard to the actual performance of the advertised machines. As the Commission pointed out, the covered machines are major ticket items generally purchased infrequently by any particular person. For that reason, their profitability does not depend on repeat purchases as is the case with frequently purchased low-cost items. A selling strategy based on this purchasing fact, *e.g.*, the making of false and unsubstantiated performance claims as to a major ticket item, would be effective for a considerable period of time, with great benefit to the merchant but at great cost to consumers. This selling strategy could readily be transferred to the marketing of other machines in the home appliance category.

[7] The prevention of "transfers" of unfair trade practices is a fundamental goal of the Commission's remedial work. Justice Brandeis, a draftsman of the 1914 legislation which created the Commission, made this point in *Federal Trade Comm'n v. Gratz,* 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993 (1920). Objecting to the Court's attempt to narrow the Commission's remedial authority, he expressed a view which has since become law: **[395]**

> The purpose of Congress [in creating the Commission] was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became general practice, that the apprehended effect of an unfair method . . . could be averted.

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[17] Attempting to avoid this conclusion, Sears states that it halted the relevant promotions in 1975, two years before the Commission, on November 20, 1977, issued its complaint. This fact is not of any particular significance since the Commission's investigation began in 1975 and may well have been the cause of Sears' reducing its use of the false claims. *See Fedders,* 529 F.2d at 1403. Nor, we might add, do we understand the Sears catalogue, where the advertisements continued in the 1976 and 1977 editions, to be an insignificant source of the company's business.

Moreover, Sears does not claim a good faith attempt to eliminate the misleading claims once they were "discovered" as did the company in *Standard Oil,* 577 F.2d at 663. Nor can it claim that the statements here were only "implied." *Id.*

Id. at 441-42, 40 S.Ct. at 579-80 (dissenting opinion).[18]

It is not only pretermitting a "general practice" which is important here, however. The "transfer" to any other single major home appliance could well cause substantial damage to consumers prior to the time that the Commission could again investigate the facts and obtain the evidence necessary to prove that a similar violation had occurred. By that time, it would be too late to protect the large number of consumers, who, in reliance on the truthfulness of the advertised claims, had purchased a major home appliance which they expected to perform the advertised work for many years. This danger is particularly acute where national brands, like Sears' major home appliances, are involved and the advertising campaigns are both widespread and intensive.

In addition, if we were to deny "transfer prevention" authority to the Commission under these circumstances, unscrupulous merchandisers (and we do not imply that Sears falls in that category) might be encouraged to transfer unlawful but successful advertising techniques from product to product, leaving the Commission the job of instituting separate proceedings to secure new orders for each unlawfully advertised product.[19] Because so drastic a limitation on the Commission's enforcement procedure would conflict with the Congressional intent described by Justice Brandeis, would consum enormous resources, and would afford no particular protection to lawful advertisements and little protection to consumers, the Commission need not wait until a "transfer" occurs before issuing multi-product orders in cases like the one before us. It may issue and enforce such orders to avert an "apprehended effect." *Id.*

To prevent the false and unsubstantiated performance claims strategy from being used in connection with another major home appliance or from becoming Sears' general practice with respect to such appliances, the Commission deemed a broad order necessary. A judgment of this nature depends on detailed knowledge of the major home appliances business and its related advertising techniques. "[D]eceptive advertising cases necessarily require 'inference and pragmatic judgment.' *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 963 (9th Cir.), *cert. denied sub nom. MacKenzie v. United States*, 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975), *quoting FTC v. Colgate-Palmolive Co.*, 380 U.S. at 385, 85 S.Ct. at 1042. This sort of knowledge of the commercial world and the ability to make the type of judgment required lie in the realm of the Commission's greatest expertise.

We note one other important fact. Unlike the orders upheld in *Colgate-Palmolive, Inc.* and *Jay Norris*, the order before us is not an all-products order. It is a limited order that applies only to 14 major ticket items. These

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[18] The *Gratz* majority opinion was overruled in *FTC v. Brown Shoe Co.*, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966).

[19] While this proposition may appear to overstate the problem, we do not believe it does since any such merchant could sign a separate consent agreement covering each violation. Then, when the Commission argued that the merchant's pattern of conduct supported a multi-product order, it would be met by the same argument that Sears makes here: that consent agreements do not constitute an admission or a finding of any violation.

14 items constitute a small proportion of the total number of products sold by Sears.

[8] In light of the flagrant and egregious nature of the violation found and the other circumstances present here, and giving the Commission's conclusions the required "great weight," *Simeon Management Corp. v. FTC*, 579 F.2d at 1145, we find no basis for substituting our judgment for the Commission's regarding the necessity for the multi-product order. We hold **[396]** that the multi-product order is reasonably related to the petitioner's conduct, that a multi-product order is appropriate, and that the inclusion of the "performance claims" provision[20] in that order is supported by the record before us and does not render the order overbroad.[21]

B. *The Third Element: Exclusion of Certain Evidence.*

Sears' third objection to the reasonableness of the order arises from the ALJ's exclusion of evidence relating to petitioner's advertising of major home appliances other than dishwashers. Sears contends that because the ALJ refused to receive or consider this evidence, the order's coverage of major home appliances is unreasonable. This argument is based on the proposition that had the evidence been admitted, Sears could have shown that its advertising of the other covered products was lawful and that the strategic misrepresentations found as to dishwashers had not been transferred to the other products. Sears reasons that such a showing would have persuaded the ALJ that a multi-product order was unnecessary. Therefore, the company concludes, the order is unreasonable.

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[20] Although Sears does not challenge the performance claim concept *per se*, we note that the concept is a limited one. As a subset of the product characteristics category, performance claims provisions limit the orders to those representations that promise results. Characteristics such as color, components or size are not performance claims and are not covered by this order. Nor are such elements as price, the existence of warranties or the existence of certain endorsements. Of course, misrepresentation of characteristics other than performance claims, while not constituting a violation of the order, may nevertheless be unlawful under the Act.

Sears attacks the prohibition of false and unsubstantiated performance claims for major home appliances other than dishwashers as vague and uncertain. It professes puzzlement regarding a hypothetical humidifier advertisement stating that humidifying air helps reduce static electricity. Sears asks: Would such a claim be an implied performance claim requiring prior substantiation under the order even though the claimed effect represents a physical principle? We find Sears' puzzlement somewhat ingenuous but set out an answer to the hypothetical nevertheless. Because the advertisement attributes a causal capability to the machine, we think it is a performance claim. Because the claim is explicit, it is not an implied claim. Since the asserted capability is a physical principle, a sentence to the file reflecting the appropriate authority would be a reasonable discharge of the substantiation requirement. Sears poses a second hypothetical: whether a statement that a micowave oven has a timer programmable up to five hours is a "performance claim?" The answer is yes. In any event, "[c]oncern that hypothetical conduct might violate the order is an insufficient reason for modification." *Borden, Inc. v. FTC*, 674 F.2d 498 at n.50 (6th Cir. 1982) (citations omitted). Moreover, if Sears develops a genuine concern that "a proposed course of action would violate the present order, [it] can, by complying with the Commission's rules, [16 C.F.R. § 2.41(d) (1981 Ed.)] oblige the Commission to give it definitive advice as to whether the proposed action, if pursued, would constitute compliance with the order." *Colgate-Palmolive Co.*, 380 U.S. at 394, 85 S.Ct. at 1047.

Sears' vagueness and uncertainty contention with respect to the performance claims aspect of the order is generally unmeritorious. In addition, we doubt that it is properly before us. Although Sears alluded to this contention in its reply brief before the Commission, in its principal brief it complained of uncertainty or vagueness only with respect to the term "major home appliances" and to one aspect of the record keeping provision, subjects we discuss in subsection C, *infra*. Thus, Sears failed to comply with the requirements of 16 C.F.R. § 3.52. *See* Section III, *infra*.

[21] Sears cites more than a dozen additional cases supposedly supporting its overbreadth challenge. Because these cases say nothing more or less than those we discuss, we need not address each case. However, Sears' reliance here on our *Standard Oil Co.*, *supra*, decision is misplaced since that order covered *all* products numbering, for that company, in the thousands. In addition, certain advertisements promoting those products were required to be completely substantiated. Here, by contrast, the order covers only 14 types of machines, is limited to performance claims, and requires only reasonable substantiation of advertisements.

This argument misperceives the nature of the Commission's authority under *Mandel Brothers* to prevent acts "like and related" to the violation found. As described, this order is based on a violation found as to a single product and the Commission's concern that the unlawful strategic misrepresentation might be transferred to other **[397]** products. By its very definition, the *Mandel Brothers* rule is designed to prevent transfers that have not yet occurred, to prevent the use of an unlawful practice in connection with the sale of products *not previously sold* in that manner. *See Niresk Industries v. FTC,* 278 F.2d 337, 343 (7th Cir.), *cert. denied,* 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104 (1960) (*quoting FTC v. Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1953) for the proposition that Commission orders are designed to prevent "illegal practices in the future.").

[9] For purposes of a "like and related" order, it may be assumed that there have been no violations with respect to the other products to be covered in the order.[22] Evidence that such is the case adds nothing to the proceedings and need not be admitted.[23] Moreover, even were such evidence admitted, it would be of little, if any, probative value. There are numerous reasons why a violator may have chosen to use a particular readily transferable unlawful advertising practice with respect to one product, but not others. The singling out of one machine for such treatment may constitute a business judgment that one such campaign at a time is enough. Other reasons may be the desire to minimize the risk of getting caught or to preserve the argument, if FTC proceedings are brought, that no more than a single product order is justified.

For these reasons, we hold that the ALJ's exclusion of evidence relating to Sears' advertising of other major home appliances was not unreasonable.[24]

C. *Record Keeping and "Major Home Appliances"*

[10] We cannot agree with Sears' argument that the record keeping provisions are ambiguous, uncertain and a "totally unwarranted burden."

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[22] An order prohibiting the repetition of "like and related" acts where such violations *had* occurred in the past, but were not a subject of the proceedings, might, under some circumstances, be contrary to the statutory procedure which requires unlawful acts to be charged and litigated. *See* 15 U.S.C. § 45(b). As a general matter, the statute does not contemplate the use of inculpatory or exculpatory evidence relating to like and related products in cases where no charge of wrongdoing is alleged in the complaint regarding those products, even though the products may, at the close of the proceedings be covered by the terms of the multi-product order. However, since we need not decide whether inculpatory evidence is admissible or under what circumstances it may be, we add that if in a particular proceeding inculpatory evidence is adduced, exculpatory evidence could not properly be excluded.

[23] Since we so conclude, it is unnecessary to consider separately Sears' argument that there is no substantial evidence in the record supporting entry of the order as to "major home appliances."

[24] Nor would this evidence have been relevant to show functional dissimilarities among the various machines covered by "major home appliances." As we said, *ante* at 392, the issue is likely similarities in machine advertising. Proof that machines perform different functions in mechanically unrelated ways does not address this question.

Basically, these provisions require Sears to maintain (1) material relied on in making claims which are subject to the order, and (2) certain contrary material in its possession, for a period of three years after it ceases making the claims in its advertising. The provisions enable the Commission to determine whether there was “prior substantiation” for Sears' claims. We hold that the order is not unduly burdensome in this regard and that the challenged terms are sufficiently clear and unambiguous. *See National Dynamics Corp. v. FTC,* 492 F.2d 1333, 1335-36 (2d Cir.), *cert. denied,* 419 U.S. 993, 95 S.Ct. 303, 42 L.Ed.2d 265 (1974).

Sears also objects to the category of “major home appliances” on the ground that there were other machines that might just as well have been included and some that might reasonably have been excluded. The Commission carefully considered all of Sears' arguments before defining the category. At Sears' request, it narrowed the proposed definition and eliminated the phrase “and any other product that falls within the categoy of major home appliances.” Also at Sears' request, it clarified **[398]** its description of the specific products.[25] The Commission explained its designation of the 14 particular machines in part on the basis that to the extent Sears deems tests necessary these products are tested in a particular Sears laboratory, the one at which Sears tested the Lady Kenmore. Thus, Sears' compliance duties may have been simplified by the Commission's categorization. There may be other definitions of “major home appliances” that would also have been appropriate. However, any difference in judgment over the inclusion or exclusion of a particular appliance is not of great significance here. The record reflects that, while definitions of the term “major home appliances” may vary in minor respects, the term has a general connotation sufficiently close to that used by the Commission to make the Commission's categorization reasonable.

III

PROCESS THEORIES

Petitioner argues next that the order, as to products other than dishwashers, is arbitrary and capricious and constitutes an abuse of discretion under section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, and the Due Process clause of the fifth amendment.

These theories appear in the litigation for the first time on this appeal.[26] The question whether petitioner waived reliance on them here by not arguing them to the Commission in the first instance is therefore before us.

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[25] The Commission's order as amended [95 F.T.C. 824] defines “major home appliances” as “air conditioning units (room or built-in), clothes washers, clothes dryers, disposers, dishwashers, trash compactors, refrigerators, refrigerator/freezers, freezers, ranges, stoves, ovens (including microwave ovens), humidifiers, and dehumidifiers.”

[26] To prosecute an appeal of an initial decision, the Commission's Rules of Practice require any party to state, “A specification of the questions intended to be urged;” 16 C.F.R. § 3.52(3) (1981), supported by “[t]he argument presenting clearly the points of fact and law relied upon in support of the position taken on each question . . .” *Id.* § 3.52(4). Exhaustion is required despite the absence of an explicit exhaustion section in the Commission's organic statute. *See Cotherman v. FTC,* 417 F.2d 587, 594 (5th Cir. 1969).

[11] Exhaustion rules insure an adequate record, prevent surprise, and avoid the application of judicial resources to matters which might be resolvable at the agency level. In *Getty Oil Co. v. Andrus*, 607 F.2d 253 (9th Cir. 1979), we said:

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented . . ." *Unemployment Compensation Commission of Territory of Alaska v. Aragon*, 329 U.S. 143, 155 [67 S.Ct. 245, 251, 91 L.Ed. 136] (1946). Thus, absent exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time.

Id. at 256 (citations omitted).[27] On the question whether exceptional circumstances exist here, Sears is silent.[28] We see none and therefore conclude that the section 706 and fifth amendment theories have been waived. *See generally Litton Industries, Inc. v. FTC*, 676 F.2d 364 (9th Cir. 1982). In any event, largely for the reasons explained in Part II, we see no merit to these arguments.[29] **[399]**

IV

FIRST AMENDMENT CONSIDERATIONS

The ground for Sears' final attack on the order is the line of recent Supreme Court cases extending certain protections of the first amendment to commercial speech.[30] From these decisions, Sears argues that the prior substantiation element of the Commission's order amounts to an unconstitutional prior restraint of protected speech or, that even if no prior restraint is found, the order's breadth and ambiguity impermissibly chill speech rights.

We consider these Constitutional arguments in the context of the particular advertising claims before us. The advertisements were of a straightforward, wholly commercial nature. Consumers were urged to purchase a Sears' product solely for reasons relating to the mechanical performance of the machine. The advertisements contained no material or comments having any relation directly or indirectly to any non-commercial first amendment interests. Our analysis is limited to advertisements of this nature.

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[27] We reaffirmed *Getty* in *Duncanson-Harrelson Co. v. Director, Etc.*, 644 F.2d 827, 832 (9th Cir. 1981).

[28] In its two briefs, Sears does not address the exhaustion issue. The test requires a court to balance a party's interest in adequate redress for grievances against the agency's interest in "applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting. . . ." *Montgomery v. Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978).

[29] This result works no injury on Sears. We have assessed vagueness and uncertainty objections in Section II, *supra*. There, we could not say the order was unreasonable, so it was unlikely we would have concluded it was "arbitrary, capricious or an abuse of discretion," the latter being a more limited standard of review than that applied under the reasonableness concept.

[30] *See e.g., Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 218 (9th Cir. 1979) (Duniway, J., concurring and dissenting).

Similar principles govern both aspects of Sears' argument. First amendment scrutiny of abridgements of commercial speech seeks to preserve the flow of truthful information from merchants to consumers. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Correlatively, false or deceptive commercial speech is entitled to no first amendment protection whatsoever. In *Central Hudson Gas v. Public Service Comm'n of New York,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Court said:

> [T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . ..

Id. at 563, 100 S.Ct. at 2349, (citations omitted).

[12] Here, we find that petitioner's first amendment claims fail. We concur in the Second Circuit's judgment that the Commission may require prior reasonable substantiation of product performance claims after finding violations of the Act, without offending the first amendment. *Jay Norris, Inc. v. FTC,* 598 F.2d at 1252.[31]

[13] With respect to the "chilling" argument, petitioner does not dispute the facts upon which the Commission based its findings of flagrant violations of the Act repeated over a four year period. No serious argument could be advanced that the Com**[400]**mission, by this order, is seeking to "keep the public ignorant" or otherwise limit the information available to the public. *Virginia Board,* 425 U.S. at 770, 96 S.Ct. at 1829. The Commission's findings represent a permissible judgment that petitioner's advertising campaign for the Lady Kenmore constitutes "communication more likely to deceive the public than to inform it. . . ." *Central Hudson Gas,* 447 U.S. at 563, 100 S.Ct. at 2350, (citations omitted). In particular, the Commission's findings that the violation found might be repeated and could be transferred readily to other major home appliances, provide adequate support for the order's application to those other appliances. Put differently, we do not think, given these findings, that the order is overbroad under the first amendment.

[14] Nor does the order offend the vagueness doctrine of the first amendment. We agree with Justice Stewart who wrote that a "commercial adver-

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[31] *See generally FTC v. Standard Education Society,* 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937); *E.F. Drew & Co. v. FTC,* 235 F.2d 735, 739-40 (2d Cir. 1956), *cert. denied,* 352 U.S. 969, 77 S.Ct. 360, 1 L.Ed.2d 323 (1957) *cited in Virginia Board,* 425 U.S. at 771 at n.24, 96 S.Ct. at 1830 n.24. Without citation, petitioner states, "[S]upreme Court decisions establish that prior restraint of truthful advertising statements offends the freedom of speech clause of the First Amendment."

The doctrinal question whether prior restraint analysis, *e.g., New York Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), is properly applicable to any commercial speech question remains open, *Friedman v. Rogers,* 440 U.S. at 10 & n.9, 99 S.Ct. at 894 & n.9; *Jay Norris, Inc. v. FTC,* 598 F.2d at 1252. *Standard Oil* is not necessarily contrary since we said there only that certain orders "[m]ay amount to a prior restrain on protected commercial speech," 577 F.2d at 662 (citation omitted) (emphasis added), and that the Commission should "exercise restraint in issuing such orders." *Id.* We see no reason to assume that the Commission failed to consider this admonition in issuing the order before us. Nor does *FTC v. Simeon Management,* 532 F.2d 708, 717 (9th Cir. 1976) stand for a different view.

tiser generally knows the product or service . . . and is in a position to verify the accuracy of his factual representations before he disseminates them," *Virginia Board,* 425 U.S. at 777, 96 S.Ct. at 1833 (concurring opinion) and that therefore, there is little "danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression . . . ." *Id.* at 777, 96 S.Ct. at 1833; *see generally* L. Tribe, *American Constitutional Law* § 12.15 (1978). The order forbides false and unsubstantiated performance claims as to certain specific products. Given these limited proscriptions, and our judgment that Sears' other vagueness objections lack merit, we find no vagueness violation here.[32]

In summary, the order does not violate any of petitioner's constitutionally protected commercial speech rights.

The Commission's order is enforced.

J. BLAINE ANDERSON, *Circuit Judge,* dissenting:

Aside from any due process considerations that may be involved in refusing to admit and consider Sears' proffered evidence relating to petitioner's advertising of major home appliances *other* than dishwashers, I would remand with instructions to reopen the proceedings to permit Sears to present its evidence attempting to delimit the broad products order entered in this case.

Recognizing the broad discretion vested in the ALJ and the Commission in the reception and rejection of offered evidence, I am nevertheless compelled by ordinary everyday principles of fair play to the conclusion that this broad discretion was abused in this case. I am persuaded that the offered evidence was relevant to the issues and ought to have been received and considered. For this reason, I would not reach the other issues at this time.

On this narrow ground, I respectfully dissent.

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[32] Petitioner's reliance on *Beneficial Corp. v. FTC,* 542 F.2d 611, 618-19 (3d Cir. 1976) is erroneous. *Beneficial* involved an order preventing any use of a heavily advertised slogan. As such, the case fell within doctrine governing Commission regulation of trade names. *See e.g., FTC* v. *Royal Milling Co.,* 288 U.S. 212, 217-18, 53 S.Ct. 335, 337, 77 L.Ed. 706 (1933); *Friedman* v. *Rogers,* 440 U.S. at n.11, 99 S.Ct. at n.11.

GENERAL FINANCE CORP., POSTAL FINANCE CO. and BARCLAYSAMERICAN CORP. v. FEDERAL TRADE COMMISSION et al.*

No. 81 C 6564 FTC File No. 802 3199

United States District Court, Northern District of Illinois
June 23, 1982

In granting defendant's motion to dismiss without prejudice, and denying plaintiffs' motion for summary judgment without prejudice as moot, court rejected finance companies' argument that preenforcement cases relied on by FTC in support of its motion were distinguishable. None of them involved the unique situation at bar where an agency was conducting an investigation in direct contravention of a statutory prohibition. Nor did the cases involve any violation of a specific statutory right granted to a party as does the case at bar.

Before GETZENDANNER, *District Judge.*

ORDER

Defendants' motion to dismiss without prejudice is granted. Plaintiffs' motion for summary judgment is denied without prejudice as moot. The Federal Trade Commission argues on the authority of numerous cases that preenforcement actions should be dismissed when an enforcement action is promptly filed by the agency. The plaintiffs argue that these are distinguishable because "[n]ot one of these cases involved the unique situation at bar where an agency is conducting an investigation in direct contravention of a statutory prohibition. These cases did not involve the violation of a specific statutory right granted to a party as does the case at bar."

In light of the well-reasoned opinion of Judge Schwartz in *Federal Trade Commission v. Dixie Finance Company,* Civil Action 82-201, (E.D. La. June 14, 1982), it is not so clear that the Federal Trade Commission is violating a specific statutory right of the plaintiffs. There is no basis for distinguishing the cases relied upon by the Federal Trade Commission at n.4, p. 3 of the Memorandum of Points and Authorities in Support of Defendants' Motion To Dismiss, and the court relies on them in dismissing this action.

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*Not otherwise reported; *aff'd,* 700 F.2d 366 (7th Cir. 1983).

FEDERAL TRADE COMMISSION
v.
DON H. SLY, UNIVERSAL CHURCH OF JESUS CHRIST and BUREAU OF COLLECTIONS*

Civ. A. No. CV 81-H-427-E FTC File No. 802 3051

United States District Court, Northern District of Alabama
June 25, 1982

In an order granting FTC's motion for contempt, court found defendants jointly and separately guilty of willfully failing to comply with its October 2, 1981 preliminary injunction and subsequent discovery order. To permit defendants to purge themselves of civil contempt and ensure their compliance with court's preliminary injunction which enjoined them from violating the Fair Debt Collection Practices Act ("FDCPA"), the contempt order required that they timely file with the court and provide to FTC a notarized affidavit or, a signed statement indicating that they would refrain from debt collection until they had submitted, and received court's approval of a plan indicating the manner in which they would collect debts so as to conform with the terms of the preliminary injunction and the FDCPA. Defendants were also permitted to purge themselves of contempt associated with the violation of court's discovery order by filing with the court and supplying plaintiff with specified documents and information. The contempt order further provided that failure to obey its mandates would result in defendant Sly's incarceration and the imposition of monetary sanctions.

Before HANCOCK, *District Judge.*

ORDER HOLDING DEFENDANTS IN CONTEMPT

This matter came on for a scheduled hearing in Anniston, Alabama, on June 25, 1982 on plaintiff's motion to hold defendants in civil contempt for violations of the preliminary injunction issued by this court on October 2, 1981, and the discovery order issued by this court on October 5, 1981. After hearing all evidence offered by the parties and considering the pleadings, the filed affidavits and exhibits, prior proceedings herein, and argument of counsel, the court dictated into the record its specific findings of facts and conclusions of law which are incorporated herein by reference. Those findings of fact and conclusions of law reflect that the court is satisfied by clear and convincing evidence that, through willful acts and omissions, each defendant is in civil contempt for failure to comply with the orders of this court issued October 2 and 5, 1981. The court reaffirms its finding made October 1, 1981, to the effect that defendant Bureau of Collections is a department of defendant Universal Church of Jesus Christ which is directed by defendant Don H. Sly and that the actions and conduct of any one of the defendants is the action and conduct of all defendants. The court specifically reaffirms its findings that defendant Sly is responsible for the activities of the other two defendants, and vice versa. In accordance with the foregoing, it is hereby ORDERED, ADJUDGED and DECREED that:

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*Not otherwise reported.

1. Plaintiff's April 1, 1982 motion for contempt is GRANTED, and defendants jointly and separately are found in civil contempt of this court for their failure to comply with the court's preliminary injunction issued on October 2, 1981 and the court's discovery order issued on October 5, 1981.

2. In order to insure compliance with this court's preliminary injunction of October 2, 1981, defendant Don H. Sly shall be subject to the sanction of incarceration in the custody of the Attorney General of the United States of America for each day, beginning on the eleventh calendar day after entry of this order, defendants or any of them fail to purge themselves of contempt in accordance with paragraph 3 hereof. Such incarceration shall not exceed a total of one hundred fifty days. In the event defendants have not filed with the clerk of the court the affidavit described in paragraph 3 hereof by the eleventh day after entry of this order, the United States Marshal shall without further notice to defendant Sly or further order of the court take custody of defendant Sly and bring him before the court for further instructions concerning his incarceration.

3. In order to purge themselves of contempt associated with the willful violation of the October 2, 1981 preliminary injunction, all defendants shall file with the court and supply to plaintiff a notarized affidavit sworn to by defendant Sly, or an unsworn statement under 28 U.S.C. § 1746 signed by defendant Sly, and subject to the penalties for perjury under 18 U.S.C. §§ 1621 and 1623, stating the defendants will not attempt to mediate or collect any debt from any consumer and will not directly or indirectly communicate with or contact any consumer, debtor or creditor regarding a debt of any nature whatever until this court has approved in writing a written plan filed with the court by defendants, showing how defendants will collect debts in a manner in compliance with the orders of this court and the Fair Debt Collection Practices Act ("FDCPA"). This plan shall include:

(i) copies of all forms to be used by defendants for collecting debts from consumers or contacting consumers regarding debts. These forms: (A) shall not threaten action which cannot legally be taken or which is not intended to be taken; and (B) shall not simulate documents authorized, issued, or approved by a court or create a false impression as to their source, authorization or approval; (C) shall not contain false representations or use deceptive means to collect or attempt to collect debts; (D) shall not include the picture of the judge which is contained on Exhibits 1, 2, 4 and 5 attached to the complaint in this matter; and (E) shall not otherwise violate the FDCPA;

(ii) the one name of defendants' business, company or organization which they will use when collecting debts from consumers or contacting consumers regarding debts;

(iii) copies of all envelopes to be used to send forms to consumers when collecting debts or when contacting consumers regarding debts. These envelopes shall not use language or symbols (such as the name "Bureau of Collections" or the picture of the judge contained on the envelope which is attached as Exhibit 5 to the complaint in this matter) which indicate that defendants are in the debt collection business;

(iv) a full explanation of how defendants' computer program has been modified so that consumers will not be dunned for amounts in excess of the amounts expressly authorized by the agreements creating the debts or as otherwise permitted by law and to otherwise effectuate compliance with the court's preliminary injunction and the FDCPA;

(v) a copy of a notice to be sent to all consumers within five days of defendants' initial contact. This notice shall include the following: (A) the amount of the consumer's debt: (B) the name of the creditor to whom the debt is owed; (C) a statement that unless the consumer within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt shall be assumed to be valid by the debt collector; (D) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt and a copy of such verification will be mailed to the consumer by the debt collector; (E) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor; and (F) the following statement: "Federal law protects you from unfair debt collection practices. If you have any complaints about the way we are collecting this debt, contact the Division of Credit Practices, Federal Trade Commission, Washington, D.C. 20580."

4. In order to insure compliance with this court's October 5, 1981 discovery order, all defendants jointly and separately shall be subject to a monetary sanction of $100 per day for each day all defendants fail to purge themselves of contempt, in accordance with paragraph 5 hereof, which monetary sanction shall begin on the sixth calendar day after entry of this order and continue through the fifteenth calendar day after entry, for a total not to exceed $1,000, which monetary sanction is to be paid by defendants to the Clerk of the court on or before the twentieth day after entry of this order.

5. In order to purge themselves of contempt associated with the violation of the October 5, 1981 discovery order, defendants shall file with the court and supply to plaintiff (i) a list of the names and addresses of all creditors who referred consumer accounts to defendants since March 20, 1978; (ii) a list of the names and addresses of all consumers whose accounts have been referred to defendants since March 20, 1978.

6. In order to insure future compliance with the preliminary injunction of this court and the FDCPA, defendants shall furnish plaintiff, 180 days

after defendants recommence collection in the manner set forth above, with a list of all consumers contacted during the 180-day period including the consumers' names and addresses, the name and address of the creditor who referred each debt, the amount of each consumer's debt, and the amount collected from each consumer.

7. Plaintiff shall recover from defendants attorney's fees and costs of the prosecution of this motion for contempt. Plaintiff shall submit an itemization of the costs and fees to this court within 30 days of the entry of this order. Any objection may be interposed in writing by defendants within 15 days after plaintiff submits the itemization, and this court shall thereafter determine the amount to be paid by defendants.

CONSUMERS UNION of U.S., INC. and PUBLIC CITIZEN, INC.
v.
FEDERAL TRADE COMMISSION, et al.*

Civ. A. No. 82-1512 FTC TRR No. 215-54

United States District Court, District of Columbia
June 28, 1982

This action was instituted to challenge the constitutionality of both Section 21 (a) of the Federal Trade Commission Improvements Act of 1980 (FTCIA), which requires FTC to submit final promulgated rules to Congress for review, and the legislative veto of the Used Car Rule. After considering the record, and pursuant to Section 21(a) of the FTCIA, the District Court certified a 3-part constitutional question to the U.S. Court of Appeals for an *en banc* ruling.

Alan B. Morrison, Washington, D.C., for plaintiffs.

Brook Hedge and *Mark C. Rutzick,* Washington, D.C., for defendants.

ORDER

PENN, *District Judge*: Whereas this action was instituted by Consumers Union of U. S., Inc. and Public Citizen, Inc. to challenge the constitutionality of Section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. Section 57a-1(a), and the legislative veto of the Used Car Rule contained in Senate Resolution 60,

Whereas the FTC Improvements Act of 1980, 15 U.S.C. Section 57a-1(f)(1), provides that in cases brought to construe the constitutionality of the Act, the district court immediately shall certify all questions of the constitutionality of the Act to the United States Court of Appeals for the circuit involved.

Therefore, upon consideration of the motion of plaintiffs for certification of the constitutional question to the Court of Appeals, the response of defendants and the entire record herein, it is by this Court this 28th day of June 1982,

Ordered and Adjudged that plaintiffs' motion is hereby granted; and it is

Further Ordered and Adjudged that the material facts are set forth in Plaintiffs' and Defendant Federal Trade Commission's Stipulation of Material Facts and Constitutional Question.

Further Ordered and Adjudged that the following question regarding the constitutionality of Section 21(a) of the Federal Trade Commission Act of 1980, 15 U.S.C. Section 57a-l(a), is hereby immediately certified to the United States Court of Appeals for the District of Columbia for a ruling

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*Reported in Trade Reg. Rep. ¶ 64,817 at 72,058 (1982-2 Trade Cases).

en banc, pursuant to Section 21(f)(1) of that Act, 15 U.S.C. Section 57a-1(f)(1):

> Whether Section 21(a) of the Federal Trade Commission Improvements Act, 15 U.S.C. Section 57a-1(a) and Senate Concurrent Resolution 60, which was approved by the Senate and House of Representatives, (a) violate the principles of separation of powers established in Articles I, II, and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative powers to Congress without any standards for the exercise of that power?

IT IS FURTHER ORDERED and ADJUDGED that the Clerk of the Court shall as soon as practicable transmit the entire record of the instant case to the Clerk of the Court of Appeals for this Circuit.

In the Matter of THE WAYNE COUNTY CITIZENS GRAND JURY*

No. 79-913-908 PZ

Circuit Court for the County of Wayne, State of Michigan
June 28, 1982

In denying an FTC petition for access to materials compiled during a terminated Michigan Grand Jury inquiry into possible price fixing in the beer industry, court held that Michigan law protected grand jury data from disclosure except by "prosecuting officers." FTC, which had closed its own investigation into the price fixing matter finding no violation, was seeking grand jury documents and information as well as the analyses and views of the Attorney General's staff, to determine whether a further inquiry was warranted. Court noted that while the applicable state statute exempted "prosecuting officers" from its non-disclosure provision, the term clearly referred to prosecuting attorneys of Michigan and did not apply to the FTC. Nor had the Commission demonstrated the particularized need or compelling necessity required to overcome the non-disclosure policy of the law governing grand jury data. In balancing the need to maintain the secrecy of grand jury data against the need for their disclosure, court concluded that the former clearly prevailed.

Before DUNN, *Chief Judge.*

OPINION

> This conclusion, however, runs counter to "a long-established policy" of secrecy, *United States v. Procter & Gamble Co. supra* (356 U.S. at 681), older than our Nation itself. The reasons therefor are manifold, *id.*, at 682, and are compelling when viewed in the light of the history and modus operandi of the grand jury.

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399, 3 L.Ed. 2d 1323, 1326, 79 S.Ct. 1237 (1959).

Upon the continued vitality of that time honored[1] principle of secrecy referenced therein issue is then instantly joined.

Succinctly stated, the petitioner at bar, the Federal Trade Commission (hereinafter the FTC) seeks a determination that would admit of discovery of information superficially entitled to the protection of the law (i.e. secrecy of Grand Jury proceedings). The operative nucleus of situational facts from which the controversy *sub judice* ensues is not subject to serious doubt and appears in the succeeding.

On or about May 16, 1979 a Citizens Grand Jury was convened within this jurisdiction to examine the possibility of a price fixing conspiracy within the Michigan beer industry putatively violative of Michigan anti-trust laws. Several thousand documents were produced by respondents herein.[2] Consistent with MCLA 767.19f (of which more anon) the Court issued protective orders with respect to said documents. In May, 1981 the term of the Grand Jury (successor) expired; no indictments were returned. On or about February 4, 1982 in conjunction therewith, the office of the Michigan Attorney General issued a press release to the effect that the investigation was closed for want of evidence to substantiate a finding of violation of Michigan law (Exhibit C, Response of Miller Brewing Company, *et al.*). Similarly and contemporaneously, the FTC was conducting its own independent investigation. At the behest of the Agency, documents were likewise produced by the brewers attendant to said investigation. On or about February 1, 1980 the FTC closed its investigation finding no violation. In the wake of the foregoing, the present cause evolves pursuant to the prospect of yet another FTC investigation. As a consequence of communications between the Agency and the Michigan Attorney General's office, the FTC seeks the Attorney General's assistance in identifying Grand Jury documents the Agency believes might warrant further investigation. Inasmuch as the information sought to be elicited directly implicates documents produced for use by the Grand Jury and information culled as a result of Grand Jury investigation, the Attorney General has hence refused to comply with the FTC request without leave of this Court. Considerate of protective orders hereinbefore issued, as were consonant with the mandates of MCLA 767.19f, that refusal was inescapable. Petitioner at bar now seeks the leave of this Court.[3] For reasons more fully hereinafter articulated, this Court is constrained to conclude that the Motion must be denied.

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*Not otherwise reported.

[1] Germinating at least as early as the *Earl of Shaftesbury's Trial* 8 How St Tr 759, 771-74 (1681) the principle has been rather uniformly accepted in Federal jurisprudence as well as the law of the several states.

[2] Respondents herein include amongst their number several brewers as well as witnesses at the Grand Jury proceedings who have been granted leave to intervene at bar, GCR 1963, 209.

Few policies of Anglo-American jurisprudence are so well entrenched as that recognizing the arm of secrecy with which Grand Jury proceeding are invested. It has since time out of mind repeatedly received the approbation of the Federal judiciary, *United States v. Procter & Gamble,* 356 U.S. 677, 2 L.Ed. 2d 1077, 78 S.Ct. 983 (1958); *Dennis v. United States,* 384 U.S. 855, 16 L.Ed. 2d 973, 86 S.Ct. 1840 (1966); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 3 L.Ed. 2d 1323, 79 S.Ct. 1237 (1959); *Douglas Oil Co. v. Petrol Stops Northwest,* 411 U.S. 211, 60 L.Ed. 2d 156, 99 S.Ct. 1667 (1979); *Costello v. United States,* 350 U.S. 359, 100 L.Ed. 1546, 63 S.Ct. 1233 (1943); *Levine v. United States,* 362 U.S. 610, 4 L.Ed. 2d 989, 80 S.Ct. 1038 (1960). That the principle of secrecy obtains as well in this jurisdiction is not subject to serious doubt, *People v. Thompson,* 122 Mich. 411 (1899); *People v. Lauder,* 82 Mich. 109 (1890); *People v. O'Neill,* 107 Mich. 556 (1895); *People v. Butler,* 221 Mich. 626 (1923); *People v. Pichitino,* 337 Mich. 90 (1953) (*cert. den.*); *People v. Wimberly,* 384 Mich. 62 (1970).

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[3] The issue at bar is narrowly circumscribed. The FTC neither seeks the documents (for respondents have stood and remain willing to produce the documents in question), nor does the FTC seek discovery of transcripts of Grand Jury testimony, rather Petitioner singularly would ask that the Attorney General be allowed to share his "work product" obtained as a result of the Grand Jury investigation with the Agency.

The rationale for said rule has been often and ably stated. The succeeding is exegesis:

> In *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-682, n 6, 2 L.Ed. 2d 1077, 78 S.Ct. 983 (1958), we said that the reasons for grand jury secrecy had been summarized correctly in *United States v. Rose,* 215 F.2d 617, 628-629 (CA3 1954):
>
> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment, or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicated by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. *Douglas Oil Co. supra,* 219 (fn 10).

It is further clear that the salutary purposes underlying the veil of secrecy cloaking Grand Jury proceedings remain an extant predicate for judicial pause when confronted by attempts to pierce that veil of secrecy. Mindful of the preceding, the issue at bar will be examined.

Petitioner in pertinent part submits a twofold predicate in support of the prayer that the veil of secrecy be disregarded, to wit, 1) that the cause *sub judice* is excepted from the general rule of non-disclosure by the terms of the Michigan statute itself (MCLA 767.19f) and 2) notwithstanding the statute at issue public policy impels the result sought. Each of the foregoing shall be addressed *seriatim infra.*

The applicable Michigan statute regarding the secrecy of proceedings of citizens Grand Juries states as follows:

> Testimony, exhibits, and proceedings; secrecy, penalties for disclosure
>
> Sec. 19f. Except as otherwise provided by law, it is unlawful for any person to publish or make known to any other person any testimony or exhibits obtained or used, or any proceeding conducted, in connection with any grand jury inquiry. Any person violating the provisions of this section is guilty of a misdemeanor punishable by imprisonment in the county jail for not more than 1 year or by a fine of not more than $1,000.00, or both. The provisions of this section respecting secrecy shall not apply to communications between prosecuting officers for the purpose of presenting evidence before the grand jury, for the purpose of reviewing evidence presented to the grand jury for prospective prosecution or for any other purpose involving the execution of a public duty. The provisions of this section shall apply to applications and petitions for and orders of immunity and to any transcript of testimony which may be delivered to a witness pursuant to his being granted immunity except that the witness may be privileged to disclose such application, petition, order and transcript to his attorney. P.A. 1927, No. 175, c. VII, § 19f, added by P.A. 1970, No. 9, § 1, Imd. Eff. March 26, 1970. MCLA 767.19f

It thus is incumbent upon this Court to decide whether or not the exception contained therein obtains at bar. In this light the central inquiry becomes whether the proposed communications between the assistant Attorney General and petitioner regarding the nature of documents submitted to the Grand Jury are "communications between prosecuting officers for . . . any other purposes involving the execution of a public duty" within the statutory intendment. Prior to assay of the statutory meaning of the foregoing phrase it is well to consider the following. MCLA 767.4a[4] provides:

> Same; testimony, exhibits, etc., unlawful possession, use, etc., of; exceptions, penalty
>
> Sec. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, *and also excepting any information heretofore disclosed before* any investigating committee of the Congress of the United States or *any agency of the federal government*. Any person violating the provisions of this section shall be guilty of a felony. P.A. 1927, No. 175, c. VII, § 4a, added by P.A. 1951, No. 276, § 1, Eff. Sept. 28, 1951. MCLA 767.4a (emphasis this Court's)

MCLA 767.19f embodies no such provision. Clearly had the legislature desired that the same exception apply with respect to 19f it would have been a pedestrian task to incorporate such a provision therein. They did not. For this forum to assume so would be to arrogate the function of the Legislative branch. It may not.

Albeit the 19f term "prosecuting officers" is not defined therein, it is elsewhere employed in a similar context as regards Grand Jury proceedings, see for example MCLA 767.15, MCLA 767.22; of particular interest is the succeeding.

> Same; subpoena of witness by prosecutor
>
> Sec. 21. The prosecuting attorney and *other prosecuting officers, may*, in all cases, *issue subpoenas for witnesses to appear and testify* on behalf of the people of this state; and the subpoena, under the hand of such officer, shall have the same force and be obeyed in the same manner and under the same penalties, as if issued by the clerk or any magistrate. MCLA 767.21

As utilized therein it would appear that the legislature quite clearly intended to delimit the term "prosecuting officers" to prosecuting officers of this state. To intuit a legislative intent to permit of "prosecuting officers" of the Federal government, any of the sister states or perhaps foreign sovereigns as well to compel attendance of witnesses at Michigan Grand Jury proceedings would be an imaginative if not a compelling construction.

Further to construe "prosecuting officers" as set forth in 19f as "prosecuting officers" of any jurisdiction would surely run afoul of one of the traditional justifications for Grand Jury secrecy in the first place.

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[4] Albeit said statute addresses "one man" Grand Juries to the extent that MCLA 767.4a and MCLA 767.19f speak to the secrecy attendant to Grand Jury proceedings they may be considered *in pari materia*.

to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. *Douglas Oil Co., supra,* 219.

Were the hypothetical construction adopted the prospect of a virtually limitless number of investigations by "prosecuting officers" throughout the nation would inescapably lead to the harassment of those investigated and exonerated by Michigan Grand Juries. In the wake of the foregoing, this Court would initially conclude that the term "prosecuting officers" as employed in 19f but refers to Michigan prosecuting officers; the FTC may not be counted among their number. Nevertheless, even assuming *arguendo* that the term is amenable to the proposed construction petitioner is no better placed for the FTC may not be deemed a "prosecuting officer" within the meaning of 19f.

As aforesaid "prosecuting officers" is not defined by the subject statute. Extant *stare decisis* in this jurisdiction is minimal. Petitioner invokes *Woll v. Attorney General,* 99 Mich. App. 749 (1980) (lv. den.) in support of the proposition that the FTC is a "prosecuting officer" within the statutory intendment; the reliance upon that case is illusory. The *Woll*[5] Court held that the State Bar Grievance Board was entitled to enforcement of a subpoena *duces tecum* by virtue of the at issue exception of MCLA 767.19f. The *ratio decidendi* therein was a product of the language of the Supreme Court itself. GCR 1963, 957.1 provides that "The Attorney Grievance Commission is the *prosecution arm* of the Supreme Court . . ." Thus *Woll* is distinguishable in the sense that, 1) it concerns an agency of the Supreme Court of this State not a Federal agency, see discussion *supra;* 2) the State entity has been defined by the Michigan Supreme Court as its prosecution arm; and 3) unlike the cause at bar, the Grand Jury proceedings in *Woll* culminated in an indictment.

Next, although as petitioner correctly notes, Federal *stare decisis* and the Rules of Criminal procedure are analogically of limited value in interpreting Michigan statutory law same nonetheless merits reference at bar.

In pertinent part, the secrecy of Grand Jury proceedings in Federal jurisprudence is within the auspices of Rule 6(E) of the Federal Rules of Criminal Procedure. An exception thereunder lies with respect to disclosure of matters occurring before the Grand Jury of an "attorney for the government" for use in the performance of such attorney's duty and such governmental personnel deemed necessary by an attorney for the government to assist in the performance of such attorney's duty to enforce the Federal criminal law. Federal *stare decisis* construing the rule has held that 1) State Attorneys General are without the parameters of the exception, see for example *In Re Grand Jury Proceedings,* 445 F.Supp. 349 (D.C. R.I. 1978); *In Re Miami Federal Grand Jury,* No. 79-8(MIA) 478 F.Supp. 490

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[5] Unlike the instant case, the petitioner in *Woll* had been indicted by a Wayne County Citizens Grand Jury.

(S.D. Fla. 1979); 2) Administrative agency attorneys are not attorneys for the government within the intendment of the subject exception, *United States v. Bates,* 627 F.2d 349 (CA DC, 1980); *In Re April 1977 Grand Jury Proceedings,* 506 F.Supp. 1174 (E.D. Mich. 1981); and 3) Consistent with (2) *supra* attorneys for the Federal Trade Commission have been held to be without the ambit of the exception lodged in 6(E). With reference thereto the succeeding is exegesis:

> The proceedings before a grand jury are protected against disclosure by the common law policy of secrecy. This policy is continued in rule 6(e) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which is the measure of the Commission's (FTC) privilege of access to the documents and transcripts requested. The first sentence of this rule permits disclosure, without leave of the district court, "of matters occurring before the grand jury * * * to the attorneys for the government for use in the performance of their duties." The term "attorneys for the government" is limited in its application to "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of the United States Attorney * * *." Fed. Rules Cr. Proc. rule 54(c), 18 U.S.C.A.
>
> It is here contended that "* * * the Commission is entitled to the use of the grand jury material * * * because of its special relation to" the Attorney General, under whose direction the grand jury proceeding was conducted. The basis of this contention is the dual responsibility of the Attorney General and the Commission for the enforcement of the Clayton Act, a responsibility which the Attorney General shares with other administrative agencies. 15 U.S.C.A. §§ 21 and 25; *United States v. W.T. Grant Co.,* 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). The attorneys for the Commission argue that since the Attorney General may have free access to the grand jury evidence in the performance of his duties the same privilege should be accorded to them.
>
> We have heretofore noted that the right of access enjoyed by the Attorney General is derived from the express language of the first sentence of rule 6(e), supra. *The term "attorneys for the government" is restrictive in its application and does not include the attorneys for the administrative agencies.* See rule 54(c), supra. *If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.* The rule is not ambiguous and we see no reason to extend its application by judicial interpretation.

In Re Grand Jury Proceedings, 309 F.2d 440, 443 (CA3, 1962) (interpolation and emphasis this Court's).

Albeit this Court is cognizant of the distinctions between the Federal Rule and cases interpreted thereunder and the Michigan statute, the preceding is at least illustrative of the rather narrow class of actors who might avail themselves of the 6(E) exception. In the case at bar, petitioner has urged for a more expansive construction of the term "prosecuting officers" under MCLA 767.19f. Such a construction must be deemed legally unpalatable.

The second portion of MCLA 767.19f under scrutiny herein appears as follows:

> The provisions of this section respecting secrecy shall not apply to communications between procecuting officers for the purpose of presenting evidence before the grand jury, for

> the purpose of reviewing evidence presented to the grand jury for prospective prosecution *or for any other purpose involving the execution of a public duty.* MCLA 767.19f (emphasis this Court's).

The parties herein, join issue on whether "for any other purpose involving the exemption of a public duty" is delimited by application of principles of *ejusdem generis* to public duties relating to Grand Jury proceedings. It is at least apparent by the statute itself that the public duties referenced therein relate to communications between prosecuting officers for a purpose involving the execution of a public duty by a prosecuting officer as a prosecuting officer. As aforesaid petitioner herein for purposes of MCLA 767.19f is not a prosecuting officer. Considerate of the foregoing, this Court then holds that the veil of secrecy obtaining with respect to the Grandd Jury proceedings at issue may not be pierced under the states execution of the statute.

As alternative *gravemen* for the disclosure sought petitioner submits that even acceding to the premise that the statutory exception does not apply, this Court might nonetheless admit of the discovery sought under the rubric of public policy. This Court will entertain the argument notwithstanding its dubious predicate, to wit that this Court might in its discretion, permit of disclosure outside the statutory framework, e.g. *People v. McRea,* 303 Mich. 213, 246 (1942) (cert. den.); *People v. O'Neill,* 107 Mich. 556 (1895).

The public policy of this jurisdiction with respect to the secrecy of Grand Jury proceedings is established beyond cavil. Witness the following:

> For the purpose of expediting the hearing of the first 11 pleas, the assistant prosecuting attorney signed a stipulation as to what testimony was taken before the grand jury. This stipulation was made the basis of the twelfth and thirteenth pleas in abatement, which allege, in substance, that there was not sufficient testimony submitted to the grand jury to authorize them to find an indictment. To the above pleas in abatement an issue of fact was joined. *The circuit judges were of the opinion that whatever knowledge the prosecuting attorney had of the proceedings in the grand-jury room he must have obtained either from the jurors or from his attendance in his official capacity, and that, as public policy did not allow him to divulge his knowledge, the stipulation could not be used.*
>
> * * * * * * *
>
> It was not competent for the prosecuting attorney to disclose what occurred in the jury-room, and the court very properly refused to act upon the stipulation.

People v. Thompson, 122 Mich. 411, 416, 418 (1899). (emphasis this Court's). Petitioner contends that a balancing of the need for secrecy *vis a vis* the necessity for disclosure mandates the latter. *People v. Wimberly,* 384 Mich. 62 (1970) is invoked as supportive thereof. *Wimberly* however, is distinguishable from the instant case the reasons are at least dual. 1) In *Wimberly* the Grand Jury had returned a true bill, and 2) there it was the defendant who was seeking the discovery. In this context, the *Wimberly* court opined:

> We are, then, confronted with a conflict between the traditional reasons for secrecy and the desirability of discovery. In resolving this conflict, we must recall the purpose secrecy serves in grand jury effectiveness and balance it against the requirement of fairness for all defendants in their resulting trials. This leads us to the conclusion that when the reasons which support the purpose for grand jury secrecy no longer exist the law should not control. And, conversely, when the need for secrecy outweighs the need for disclosure, secrecy should prevail. *Wimberly, supra,* 67, 68.

So saying the Court established criteria for divulgence aforesaid.

> *Once a witness has testified at trial we hold as a matter of law that the traditional reasons for secrecy no longer exist and, as a matter of right, the defendant is entitled to all the testimony that witness gave before the grand jury relevant to the defendant's guilt or innocence.* If the prosecutor wishes to suppress any testimony such witness gave before the grand jury, he must establish that it is not relevant to the defendant's guilt or innocence. Any such request for retention of grand jury records must be determined pursuant to an "in camera inspection" by the trial judge of the testimony the prosecutor possesses and wishes to keep secret.
>
> *We hold that prior to trial the trial judge possesses the discretion in the interests of a fair trial to release any and all of the grand jury testimony relevant to the guilt or innocence of the defendant to the crime charged.* In exercising his discretion, the trial judge might require that a particularized need be shown by the defendant or proof that none of the traditional reasons for secrecy controls in his case. In any event, this pretrial discovery rests in the sound discretion of the trial judge. *Wimberly, supra,* 68, 69.

Thus, *Wimberly* addresses a *request by a defendant* who has been *charged with crime.*[6] In the case at bar it is not respondents who have made the request for disclosure, nor were they indicted by the Grand Jury. In a strict sense *Wimberly* is thus inapposite. Applying the test contained therein, however, the result yet remains unaltered.

The balancing test set forth in *Wimberly* that is to say a consideration of the need for secrecy *vis-a-vis* the need for disclosure involves the application of the factors set forth therein.[7] The first factor is preventing the accused from escaping before indictment or from tampering with witnesses against him; disclosure here would occasion an adverse impact upon prospective Grand Jury proceedings. Second, to prevent disclosure of derogatory information presented to the Grand Jury against an accused who has not been indicted is doubtless instantly germane. Respondents at bar were not indicted; both the Attorney General and petitioner herein have formerly terminated investigations involving putative misconduct. Third, to encourage complainants and witnesses to come before the Grand Jury and speak freely without fear that their testimony will be made public, thereby subjecting them to possible discomfort or retaliation; disclosure would surely have a debilitating effect on the Grand Jury system in this respect. Fourth, encouraging grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings; discovery herein would effectively discourage grand jurors from accomplishing those goals for which the institution was conceived.

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[6] In a like vein GCR 1963, 787 but addresses discovery by a defendant.

[7] See *Wimberly, supra,* 67 (fn 3) quoting from Justice Brennan's dissent in *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 403 (79 S.Ct. 1237, 1243; 3 L.ED. 2d 1323, 1328) (1959).

Synopsizing the preceding it appears that the need for secrecy at bar is compelling. Each of the above discussed criteria militate against disclosure. The untoward consequences of disclosure to the Grand Jury system are patently evident. Conversely, the need for disclosure is neither legally compelling nor logically persuasive. Petitioner submits *inter alia* that disclosure would expedite further investigation and render it less costly. Were such consideration decisional the procedural constraints of U.S. Con., Amend. IV, V, VI ought as well be cavalierly dispatched. The particularized need or compelling necessity required to overcome the policy of secrecy, *Douglas Oil Co., supra, Pittsburgh Plate Glass Co., supra,* are not met by a showing that disclosure would facilitate an investigation or render it less costly, *United States v. Procter & Gamble Co.,* 356 U.S. 677, 682, 2 L.Ed. 2d 1077, 1078 S.Ct. 983 (1958); *In Re Disclosure of Evidence,* 650 F.2d 599 (CA 5, 1981); *In Re Grand Jury Proceedings,* 445 F.Supp. 349, 350 (D.C. R.I.) app. dis. 580 F.2d 13 (CA 1, 1978); *Hancock Brothers Inc. v. Jones,* 293 F.Supp. 1229, 1232 (N.D. Cal., 1968); *ABC Great Stores Inc. v. Globe Ticket Company,* 309 F.Supp. 181, 183 (E.D. Penn., 1970). Petitioner herein has failed to demonstrate the particularized need or compelling necessity *sine qua non* to disclosure. The balance between the need for secrecy versus the need for disclosure is clearly struck in favor of the former.

In recapitulation this Court concluded 1) that the exception to the secrecy insulating Grand Jury proceeding contained in MCLA 767.19f is inapplicable in this case, and 2) assuming an arguable avenue for discovery under the euphemism of public policy, in balancing the need for secrecy as opposed to the need for disclosure the former clearly prevails. No particularized need nor compelling necessity is manifest.

> The Court is confident that denial of the motion is appropriate notwithstanding prior construction of the rule by the courts. Neither court rule nor routine judicial supervision can be expected to eliminate grand jury abuse. The principal reason that the grand jury system continued to thrive as a part of a system that is otherwise designed to be protective of peoples rights is that the great majority of attorneys for the government are honorable people who are conscious of the rights of others and the need for self-restraint. In the Court's opinion, the attorneys for the government in this case are such persons. Nonetheless, if the Court were to grant the government's motion in this case, it would be the first chapter in a book that ought not to be written.

In Re April 1977 Grand Jury Proceedings, 506 F.Supp. 1174, 1181, 1182 (E.D. Mich. 1981).

The Motion for Leave To Obtain Access to Grand Jury Materials is accordingly Denied.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

CONSUMERS UNION of U.S., INC. and PUBLIC CITIZEN, INC.
v.
FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 82-1512 FTC File No. 82-1737

United States District Court, District of Columbia
July 23, 1982

District Court denied Congress' petition which sought to have the matter concerning the constitutionality of § 21(a) of the Federal Trade Commission Improvements Act of 1980 remanded from the Court of Appeals, so that additional factual issues could be certified. Court held that additional "factual issues" were really characterizations of public documents that could readily be referred to in briefing before the Court of Appeals. Court ruled that although its order of June 28, 1982 was premature in that the House and Senate did not have an opportunity to respond before certification, defendants had not been prejudiced by the premature certification. Further, both the House and the Senate have had ample opportunity to develop their own record in this proceeding, and no additional material factual issues have been revealed other than those stipulated to by the plaintiffs and the FTC. More importantly, neither the House nor the Senate dispute these facts. Based on the facts and issues presented in this proceeding, Court concluded that it would have certified the same facts and constitutional question to the Court of Appeals, and that while additional facts could have been certified, they would not have been material to the resolution of the constitutional question.

Alan B. Morrison, Washington, D.C., for plaintiffs.

Brook Hedge and *Mark C. Rutzick*, Washington, D.C., for defendant FTC.

M. Elizabeth Culbreth, Michael Davidson and *Charles Tiefer*, Washington, D.C., for defendants U.S. Senate and House of Representatives.

MEMORANDUM OPINION

PENN, *District Judge*: The plaintiffs, Consumers Union of U.S., Inc. and Public Citizen, Inc., filed this action on June 2, 1982, in which they seek to have the Court declare; "that Section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(a), and the congressional veto of the Used Car Rule (Senate Concurrent Resolution 60) are unconstitutional and hence null and void." Named as defendants are the Federal Trade Commission (FTC), the United States Senate (Senate) and the United States House of Representatives (House).

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*Reported in Trade Reg. Rep. ¶ 64,865 at 72,309 (1982-2 Trade Cases).

I.

On June 25, 1982, the plaintiffs filed a motion for certification of the constitutional question to the United States Court of Appeals for a ruling en banc. 15 U.S.C. § 57a-1(f)(l) provides that any interested party may institute an action to construe the constitutionality of any provision of the Federal Trade Commission Improvements Act of 1980 and that "[t]he district court immediately shall certify all questions of constitutionality . . . to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." Attached to the motion was a "stipulation of material facts and constitutional questions" entered into by the plaintiffs and the FTC. The Senate and the House did not join in the stipulation and had not responded as of that date. The Court pursuant to the statute, signed the order certifying the constitutional question to the court of appeals on June 28, 1982. That order was filed the following day.

On July 8, 1982, the Senate and the House filed a motion for relief from the order certifying the case to the court of appeals. These two defendants complained that they had until July 8, 1982, to respond to plaintiffs motion and that the case should not have been certified prior to that date. They argued that the function of the district court is to make findings of facts with reference to the constitutional issues presented in the complaint and to identify the constitutional issues. Basically, both the Senate and the House believe the "questions should be certified as they were framed in the complaint." Senate-House motion at 5. Moreover, the House would seek certification of an additional question, namely, whether the action presents a justiciable case or controversy under Article III of the Constitution.

The Senate and the House seek to have the Court transmit an order to the Court of Appeals "requesting that the order of June 29, 1982, be vacated and the case remanded to permit the Senate and the House to be heard on the facts which should be found and the constitutional question which should be certified to the court of appeals."

On July 13, 1982, the Court heard the Senate-House motion. The plaintiffs and the FTC vigorously oppose any request for remand because, as they advised the Court, they have requested an expedited schedule for briefs and oral arguments before the court of appeals. If their suggestions are followed by that court, opening briefs for the plaintiffs and the FTC will be due on July 30, 1982. They also contend the remand is unnecessary and would defeat the intent of Congress that the proceedings be expedited to the greatest extent possible. Finally, they contend that the Senate and the House have failed to identify "a single fact" not included in the stipulation of material facts already certified to the court of appeals.

At the conclusion of the hearing, the Court directed the Senate and the House to file their proposed findings of fact. This was done to allow those two defendants to clearly establish for the record that there are genuine issues of material fact or, that there is a need for the Court to make additional findings of fact. They were to file their proposed findings of fact together with any relevant exhibits, and the constitutional questions they proposed for certification on or before July 15, 1982. Once filed, the Court advised the parties that it might schedule a further hearing on July 16th. On July 15 the Senate and the House filed a supplemental memorandum to their motion for relief and also filed proposed findings of material facts and two proposed constitutional questions. After reviewing these submissions, the Court scheduled a hearing for the afternoon of July 16, 1982.

During the hearing on July 16, it became apparent that the "factual" issues referred to by the Senate and the House were really "legislative facts" in the sense that the facts were part of the legislative, administrative, and rulemaking history that can be readily gleaned from the exhibits submitted by the Senate and the House. The "factual issues" appear to amount to no more than the characterization one might give to statements contained in the exhibits. There are no true issues of material facts. This Court sees little difference between the "factual" issues the Senate and the House allege exist in the case and the references one might make to the legislative history of a statute including committee reports, comments by committee members or debates on the floor of the Senate or the House. While persons may give different interpretations or characterizations to the same language, such interpretations or characterizations do not amount to true factual issues in the context of this case. Additionally, if and when this case is argued before the court of appeals, each judge will no doubt rely upon his or her reading of the documents and the related legislative and administrative history rather than to rely upon this Court's interpretation.

Nevertheless, the Court required the plaintiffs and the FTC to respond to the proposed findings of facts filed by the Senate and the House and those submissions were filed on July 19, 1982. As anticipated, the response of the plaintiffs and the FTC serve only to demonstrate that there are no true factual issues; rather, there is a debate over characterization of the FTC rulemaking record. Finally, the Senate and the House were afforded time to respond to the July 19th submission by the plaintiffs and the FTC and they filed their response on July 20, 1982.

During the course of arguments on July 16, counsel for the Senate and the House advised the Court that the only constitutional question that they would seek to certify is the one set forth in their statement of constitutional questions concerning the constitutionality of the subject statute. In addition, the House would certify one additional question concerning the justiciability issue. All parties have advised the Court that the documents now before the Court constitute the complete record in the case.

II.

There is no question but that neither the Senate nor the House responded to the plaintiffs' motion to certify prior to the Court's order of June 28, 1982. Thus, up to that point, they had not been heard on the question of any factual issues or the constitional question to be certified. Although 15 U.S.C. § 57a-l(f)(l) provides that the district court shall "immediately" certify all questions of constitutionality to the court of appeals, that language has not been interpreted to mean that certification will take place as soon as a complaint is filed; rather, the parties shall have an opportunity to pose the question and identify any facts relevant to the consideration of the question after which the district court shall make any necessary findings of material fact and certify the constitutional question. See *Buckley v. Valeo,* 171 U.S. App. D.C. 168, 519 F.2d 817 (1975). This means that the Senate and the House should properly have been heard prior to certification. Thus, the Court concludes that the order of June 28, 1982, was premature even though the statute requires expedited action.

Therefore, it appears that the motion for relief filed by the Senate and the House should be granted if such action is necessary to ensure them an opportunity to present their views or obtain certification of a constitutional question not already certified to the court of appeals. Obviously, keeping in mind the requirement that action be expedited, if the Senate and the House had announced that they were satisfied with the certification of fact and the constitutional question, it would be a useless act to seek remand since any error in the premature certification would be harmless and not prejudicial. Moreover, and perhaps most important, a remand under such circumstances would not be helpful to the court of appeals.

Here, the Senate and the House purport to disagree with the questions certified and contend that the Court should make additional findings of fact. As to the findings of facts, it is unnecessary for the Court to seek a remand because there are no additional facts to be certified since this case really presents no material factual issues other than those stipulated by the plaintiffs and the FTC. Significantly, neither the Senate nor the House dispute those facts. As for the additional "facts" included in the Senate-House findings of facts, they appear to be no more than characterizations of the record upon which the parties may disagree; but, they are not true material facts necessary for the determination of the constitutional question posed to the court of appeals. All parties are free to argue from the record and the court of appeals may rely on these exhibits, which actually constitute the legislative, administrative and rulemaking history, without regard to this Court's characterization of that history. In short, it does not appear that the acts of this Court in commenting on, for example, The Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rules (16 CFR 435). Senate-House Exhibit K, will be of any assistance to the court of appeals or to the Supreme Court, if the case reaches that level. Accordingly, this Court sees no need to add to or amplify the facts already set forth and adopted in its certification order dated June 28, 1982. In other words, had the Senate and the House answered before June 28 and the parties presented the same arguments, the Court would have concluded that the facts already certified are the only facts necessary for the court of appeals determination of the constitutionality of the statute. The exhibits attached to the Senate-House findings of fact are important and all parties agree to their authenticity. Since the parties agree to the authenticity of the documents the record before the court of appeals can be supplemented. It must be kept in mind that the only relevant facts are those material to the constitutional issue.

As to the certification of the constitutional question, the Court finds little difference on the question already certified and that which the Senate and the House propose to certify. Indeed, the plaintiffs and the FTC have no objection to certification of the Senate-House question. The questions pose the same issue and this court sees no reason to seek remand in this proceeding for that purpose. Likewise, the Court concludes that there is no reason to seek remand to pose the second question concerning whether the matter presents a case or controversy. That issue goes to the jurisdiction of the Court to entertain the case and a court may always question its jurisdiction. Jurisdiction is an issue presented in every case brought in a federal court. Finally, the Court need not certify that question to the court of appeals since that question does not address the constitutionality of the statute itself. See 15 U.S.C. § 57a-l(f)(l).

The Senate and the House rely on *Buckley v. Valeo, supra,* in support of their motion but the issues in that case were different. First, apparently the trial court had not posed the constitutional question. See 171 U.S. App. D.C. at 172, 519 F.2d at 821 (Bazelon, C.J., dissenting). Second, it appears that there were true factual issues in the case.

In sum, although the Court concludes that its certification order was premature in that the Senate and the House did not have an opportunity to respond to the motion prior to certification; having now heard the response of those two defendants, the Court concludes that the same question and the same facts would have been certified. While additional facts could have been certified, those facts are not material to the resolution of the single constitutional question certified by the Court. Having in mind the requirement that the Court "immediately" certify the case where the constitutionality of the statute is in question, and recognizing that the Senate and the House have not been prejudiced by the premature certification in that they have had a full opportunity to develop their record in the present proceedings before this Court, and that further findings of fact will not aid or assist the framing of the question or the court of appeals, the Court concludes that the motion should be denied.

ORDER

It is hereby

Ordered that the motion of the United States Senate and the United States House of Representatives for relief from the Order of June 29, 1982, is denied, and it is further

Ordered that the submission and exhibits filed by the parties in support of and in opposition to the motion are made a part of the record in this case so that the parties may designate those parts of the record as the record on appeal.

AUDUBON LIFE INSURANCE COMPANY and COMMERCIAL SECURITIES CO., INC.
v.
FEDERAL TRADE COMMISSION, et al.*

Civ. A. No. 81-952-B FTC File No. 802 3199

United States District Court, Middle District of Louisiana
July 30, 1982

1. **Where plaintiffs had adequate remedies available under FTCA enforcement proceedings, and had failed to establish an immediate need for relief or to demonstrate that mere existence of an investigation would cause irreparable harm, complaint was not ripe for review.**

Complaint in which certain insurer sought to enjoin Federal Trade Commission from conducting an investigation into whether certain insurers and automobile dealerships were misrepresenting that purchase of credit insurance was prerequisite to extension of credit was not ripe for adjudication in that insurers had adequate remedies through enforcement proceedings provided under the Federal Trade Commission Act, plaintiffs failed to establish present [1363] need for relief, and plaintiffs failed to establish very existence of investigation caused irreparable harm.

2. **Litigation costs do not constitute irreparable harm necessary to circumvent statutory provisions for judicial review.**

Legal expenses and business losses from contesting legality of agency investigation did not constitute irreparable harm such that will allow circumvention of statutory provisions for judicial review.

3. **Despite contention that FTC was required to bring any contemplated enforcement proceedings as compulsory counterclaim, Court was not required to hear complaint of insurers who improperly sought to elude reviewability and ripeness requirements in a preenforcement action to stop agency investigation.**

District court was not required to hear complaint in which certain insurers sought to enjoin the Federal Trade Commission from conducting investigation into whether certain insurers and automobile dealerships were misrepresenting that purchase of credit insurance was prerequisite to extension of credit, although plaintiffs contended the FTC was required to bring any contemplated enforcement proceedings as compulsory counterclaim, in that plaintiffs were seeking to circumvent requirements of reviewability and ripeness in preenforcement action to halt agency investigation which was not permissible.

4. **Prevention of multiplicity of litigations is intent of federal rule governing compulsory counterclaims.**

Purpose of federal rule governing compulsory counterclaim is prevention of multiplicity of litigations.

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*Reported in 543 F.Supp. 1362 (1982).

Complaint was filed in which insurer sought to enjoin the Federal Trade Commission from conducting investigation into whether certain insurers and automobile dealerships were misrepresenting that purchase of credit insurance was prerequisite to extension of credit. The District Court, Polozola, J., held that complaint was not ripe for adjudication. Ordered accordingly.

(*Syllabus, with substituted captions, taken from 543 F.Supp. 1362*)

Robert A. Hawthorne, Jr., Sanders, Downing, Kean & Cazedessus, Baton Rouge, La., *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C., for plaintiffs.

J. Paul McGrath, Asst Atty. Gen., Washington, D.C., *Stanford O. Bardwell, Jr.,* U.S. Atty., M.D. La., Baton Rouge, La., *Sandra M. Schraibman* and *Surell Brady,* Attorneys, Dept of Justice, Washington, D.C., for defendants; *John H. Carley,* Gen. Counsel, *Howard E. Shapiro,* Deputy Gen. Counsel, *Ernest J. Isenstadt,* Acting Asst. Gen. Counsel, *Leslie Rice Melman,* Attorney, F.T.C., Washington, D.C., of counsel.

Before POLOZOLA, *District Judge.*

The circumstances giving rise to this action began in September, 1980, when the Federal Trade Commission (F.T.C.) adopted a resolution authorizing the use of compulsory process in a nonpublic investigation of the practices of certain finance companies and automobile dealerships. The resolution provided that the F.T.C. was to conduct an investigation to determine whether certain unnamed companies and dealerships were acting in violation of Section 5 of the F.T.C. Act (Act), 15 U.S.C. § 45, against unfair or deceptive practices. In particular, the investigation was directed at businesses which allegedly misrepresented that the purchase of credit insurance was a prerequisite to the extension of credit. After the F.T.C. formally initiated the investigation, a notice was sent to approximately 50 finance companies, including Commercial Securities Company, Inc. (Commercial Securities), one of the plaintiffs herein. This notice advised the companies that under Section 5(m)(1)(B) of the F.T.C. Act, 15 U.S.C. § 45(m)(1)(B), violators[1] of the Act are subjected to civil penalties of $10,000 per violation when the F.T.C. declares a practice to be deceptive or unfair, and issues a final cease and desist order. Accompanying the notices sent to the companies were copies of the statute and prior decisions issued by the F.T.C. which held that misrepresentations made by a business to prospective consumer borrowers that the purchase of credit life insurance is a prerequisite to the extension of credit violates Section 5 of the F.T.C. Act.

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[1] A violator who has actual knowledge of an order issued by the F.T.C. declaring a practice to be deceptive or unfair is subject to civil penalties for a violation thereof whether or not the violator is a party to the cease and desist order.

In May, 1981, the F.T.C. issued civil investigative demands (CID's)[2] to 43 fi**[1364]**nance companies and automobile dealerships, including Commercial Securities, seeking documentary materials reflecting policies and procedures used by the businesses for the disclosure of the optional status of credit insurance in connection with the businesses' consumer finance activities. In June, 1981, Commercial Securities filed a petition with the F.T.C. to quash the CID. The F.T.C. denied both this petition and a motion by Commercial Securities for the F.T.C. to reconsider the denial of the petition. Subsequently, Commercial Securities refused to comply with the CID and has filed a suit in this court seeking injunctive and declaratory relief.

The plaintiffs in this case are Commercial Securities Company, Inc., a finance company, and Audubon Life Insurance Company (Audubon), a wholly owned subsidiary of Commercial Securities. Named as defendants are the F.T.C. and the individual Commissioners of the F.T.C.

The plaintiffs in this case seek a declaratory judgment declaring that the investigation being conducted by the F.T.C. is illegal. Plaintiffs also seek to have the investigation enjoined. The plaintiffs contend that the investigation being conducted by the F.T.C. is an investigation of the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* Thus, plaintiffs contend the F.T.C. is prohibited from conducting the investigation.

After this suit was filed, the plaintiffs filed a motion for summary judgment or, in the alternative, for a preliminary injunction. The defendants have filed a motion for summary judgment or, in the alternative, to dismiss.

Plaintiffs contend that the F.T.C. is prohibited from investigating the "business of insurance." Thus, plaintiffs argue that their summary judgment should be granted on the merits of this case. In the alternative, plaintiffs contend that the Court should grant a preliminary injunction enjoining the F.T.C. from conducting its investigation of plaintiffs' business practices. Plaintiffs also demand that the F.T.C. be ordered to file in a compulsory counterclaim such enforcement proceedings necessary to enforce the compulsory process issued by the F.T.C. to the plaintiffs in connection with the investigation.

The F.T.C. in its motion has requested that plaintiffs' suit be dismissed because the enforcement proceedings provided under the Federal Trade Commission Act give an adequate remedy at law to the plaintiffs. The F.T.C. further claims that the suit, as it now stands, is not ripe for adjudication. The F.T.C. also questions the standing of Audubon Life Insurance Company to bring this suit. Finally, the F.T.C. seeks summary judgment on the merits of the case.

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[2] Civil investigative demands are issued by the F.T.C. under Section 20(c)(1) of the F.T.C. Act, 15 U.S.C. § 57b-1(c)(1). The CID's require testimony, production of documents, reports, or answers to interrogatories, whenever the F.T.C. has reason to believe that the recipient may possess information relevant to unfair or deceptive practices. Section 20(e) of the Act, 15 U.S.C. § 57b-1(e) provides that if the CID is not complied with, the F.T.C. must file a petition in federal district court to have the demand enforced. § 57b-1(h) provides that district courts have jurisdiction to hear such proceedings and to issue final orders compelling compliance. Also, the court may punish noncompliance as contempt of court and the orders are appealable pursuant to 28 U.S.C. § 1291.

[1] The parties have filed excellent briefs with the Court in support of their respective contentions which the Court has carefully studied and compared with the Court's own independent research. After reviewing the entire record, the Court finds that plaintiffs' suit in this Court is premature because plaintiffs have an adequate remedy under the Federal Trade Commission Act. Since this case is not ripe for adjudication, defendants' motion to dismiss is hereby granted.[3] **[1365]**

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:[4]

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance: *Provided,* that after June 30, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

In additon to this general restriction on the F.T.C., plaintiffs rely on Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46 which provides the source for the investigative power of the F.T.C. The extent of the investigative powers set forth in Section 6 is broader than the regulatory power given to the agency in Section 5 of the Act. In 1980 this section was amended to specifically exclude from the scope of the F.T.C. authority the investigation of the "business of insurance," except in instances when it is requested by Congressional committees to make studies or reports in this area.[5] Under these two provisions the plaintiffs contend that the F.T.C. lacks jurisdiction to investigate their business practices.

The right of judicial review of an action by an administrative agency is granted to persons adversely affected by the action in 5 U.S.C. §§ 701-706, enacted under the Administrative Procedure Act. Section 703 provides that the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter unless none is provided for, or if that which is provided for would be inadequate. In such case any applicable legal action, including actions for declaratory judgments or injunctive relief, may be brought in a court of competent jurisdiction.[6]

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[3] Because the court has granted defendants' motion to dismiss, it is unnecessary for the Court to consider defendants contentions that Audubon Life Insurance Company lacks standing to sue and the motions for summary judgment filed by the plaintiffs and defendants seeking summary judgment on the merits of this case.

[4] On June 28, 1982 the United States Supreme Court rendered its decision in *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 102 S.Ct. 3002, 72 L.Ed.2d ______, 1982. The Supreme Court, following its earlier decision in *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 99 S.Ct.1067, 59 L.Ed.2d 261 (1979) "identified three criteria relevant in determining whether a particular practice is part of the 'business of insurance'" exempted by Section 2(b) of the McCarren-Ferguson Act:

> "*first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co.,* 458 U.S. at ____, 102 S.Ct. at ____.

Because the Court's ruling in the case sub judice, it is not necessary for this Court to determine whether the "business of insurance" exemption is applicable under the facts of this case.

[5] 15 U.S.C. § 46(h) as amended provides in pertinent part:

> Nothing in this section (other than the provisions of clause (c) and clause (d)) shall apply to the business of insurance, except that the Commission shall have authority to conduct studies and prepare reports relating to the business of insurance. The Commission may exercise such authority only upon receiving a request which is agreed to by a majority of the members of the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Energy and Commerce of the House of Representatives. The authority to conduct any such study shall expire at the end of the Congress during which the request for such study was made.

In addition to the limitations on judicial review set forth in 5 U.S.C. § 703, Section 704 further defines this limitation by stating:**[1366]**

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . .

It thus appears that under the Administrative Procedure Act, in order for plaintiffs to maintain this action, not only must the initiation of the F.T.C. investigation and the issuance of the CID constitute "final agency action," but the judicial review provided for in the CID enforcement proceeding of 15 U.S.C. § 57b-1(e) and § 57b-1(h) must be an inadequate remedy for the plaintiffs. The plaintiffs have failed to make this requisite showing. Thus, their suit must be dismissed. In making this determination, the Court is bound by the decision rendered by the Fifth Circuit Court of Appeals in *Atlantic Richfield Co. v. FTC,* 546 F2.d 646 (5th Cir. 1977). In the *Atlantic Richfield* case, ARCO sued for both injunctive and declaratory relief in response to a subpoena duces tecum issued to it by the F.T.C. ARCO argued that any disclosure of the subpoenaed material to the F.T.C. staff involved in another adjudicatory proceeding pending against ARCO and other oil companies would violate ARCO's procedural rights to a fair hearing in violation of the Due Process Clause of the Constitution, as well as the Adminstrative Procedure Act. The Fifth Circuit held that the relief requested by ARCO was unavailable to ARCO because (1) ARCO had an adequate remedy at law under *Reisman v. Caplin,* 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2.d 459 (1964); and (2) the case was not ripe for adjudication under a trilogy of Supreme Court decisions, *Abbott Labortories v. Gardiner,* 387 U.S. 136, 87 S.Ct 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Association v. Gardiner,* 387 U.S. 158 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); and *Gardiner v. Toilet Goods Association,* 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967).

The Court in *Atlantic Richfield* found that Reisman controlled its decision because in that case taxpayers were denied injunctive and declaratory relief where the I.R.S. issued an administrative summons directing the production of documentary materials from the taxpayers. Although the summons was challenged on several constitutional grounds, the Supreme Court found that pre-enforcement relief would be unwarranted. The statutory provision for judicial enforcement of the I.R.S. summons is essentially the same as the provisions for the enforcement of F.T.C. subpoenas under Section 9 of the F.T.C. Act, 15 U.S.C. 49, and the F.T.C. CID's under 15 U.S.C. § 57b-1(e) and (h). These summonses, subpoenas, and CID's may only be enforced by a district court. Only a refusal to comply with an order of a district judge would subject the recipient to contempt proceedings. Under these circumstances, both the Supreme Court and the Fifth Circuit found that the statutory provisions allowing a party to challenge the action of the agency in the enforcement proceedings provided an adequate remedy at law so that injunctive and declaratory relief in advance of such proceedings would be improper. Thus, "where Congress has provided an adequate procedure for judicial review of administrative action, that procedure must be followed." *Atlantic Richfield,* supra, 546 F.2d at 649.

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[6] 5 U.S.C. § 703 provides in full:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

The plaintiffs in this case assert that they are entitiled to preemptive relief despite the statutory remedy available in the enforcement proceeding because they are challenging the *jurisdiction* of the F.T.C. to conduct the investigation in question. This position is untenable. *F.T.C. v. Claire Furnace Co.,* 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927). In *Claire Furnace*[7] **[1367]** the plaintiffs sought to have the F.T.C. enjoined from enforcing orders issued by the agency which commanded the plaintiffs to supply large quantities of information. The plaintiffs contended there, just as the plaintiffs do in this case, that the F.T.C. had no authority under Section 6 of the F.T.C. Act to investigate the matters under inquiry. The heart of the dispute in *Claire Furnace* centered upon the plaintiffs' contention that the information sought by the F.T.C. did not pertain to interstate commerce and, therefore, it was not subject to inquiry under Section 6 of the Act. The Supreme Court held that since the enforcement proceeding necessary to compel compliance provided plaintiffs with an adequate opportunity for adjudication of the F.T.C.'s jurisdiction, the pre-enforcement action should be dismissed.

Actually, in this case plaintiffs, Audubon and Commerical Securities, do not claim that they are unable to assert the alleged lack of jurisdiction in an enforcement proceeding. Nor do they dispute the numerous cases which indicate that when a subject is specifically exempted from the investigatory jurisdiction of the F.T.C. this lack of jurisdiction may be contested at a proceeding to obtain enforcement of compulsory process issued in conjunction with that investigation.[8] Rather, they contend that in addition to this statutory remedy, they are also entitled to a preemptive attack upon the investigation. Despite ample authority indicating that the issue of investigatory jurisdiction may be raised in enforcement proceedings, the plaintiffs have cited no cases where an investigation has been blocked on this ground *prior* to such action by the agency. The whole of plaintiffs' argument rests upon the 1980 exemption of the business of insurance from the F.T.C.'s power under 15 U.S.C. § 46 and a Senate committee report expressing the intention that this jurisdictional issue receive the same judicial review accorded under decisions construing existing exemptions.

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[7] Although *Claire Furnace* was one of the earliest cases in this area and many cases have been decided since, its principles still govern cases such as the one at bar, as evidenced by the decisions rendered in *Reisman* and *Atlantic Richfield.* The Sixth Circuit in *American Motors Corp. v. F.T.C.,* 601 F.2d 1329 (1979), denied pre-enforcement injunctive and declaratory relief from an F.T.C. subpoena for this reason. The Sixth Circuit said that *Claire Furnace* "has never been overruled and it appears clearly to mandate the corporation's use of its defenses at any forthcoming FTC enforcement as its remedy." 601 F.2d at 1336. The Eighth Circuit also relied upon *Claire Furnace* in reaching the same result in *Anheuser-Busch, Inc. v. F.T.C.,* 359 F.2d 487 (8th Cir. 1966), which was authored by now Justice Blackmun. See also: *Casey v. F.T.C.,* 578 F.2d 793 (9th Cir. 1978). In the *Casey* case, as in *Atlantic Richfield,* an alternative ground for the denial of relief was the existence of an adequate remedy in the enforcement proceeding.

The 1980 legislation amending 15 U.S.C. § 46 did not create a new avenue of judicial review for F.T.C. actions. The amendment simply stated that the investigatory power given to the F.T.C. in that section would not apply to the business of insurance. Thus, if the F.T.C. were to disregard this limit on its authority, the legal remedy would be the same afforded persons aggrieved by other proscribed agency investigations. The language cited by plaintiffs from the report of the Senate Commerce, **[1368]** Science and Transportation Committee merely restates this proposition. In its report the Committee stated:

> The amendment contemplates that, in determining what lies within the "business of insurance" the FTI (sic) will adhere to the judicial precedents. However, the Committee also recognizes that reasonable differences of opinion may exist with regard to whether certain peripheral activities of insurance companies or agents are the "business of insurance." The amendment is thus *intended to permit judicial review on jurisdictional questions as now permitted under the court decisions construing the existing exemptions from section 6.* See e.g., *FTC v. Miller,* 549 F.2d 452 (7th Cir. 1977). (Emphasis supplied.)

Senate Report No. 96-500, 1980 U.S.Code Cong. and Adm.News, p. 1102 at p. 1117.

As previously noted, the courts have allowed exemptions to be raised as jurisdictional bars in enforcement proceedings, but where these exemptions have been relied upon to acquire preemptive relief, the courts have refused to grant it.

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[8] See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, at 652, 70 S.Ct. 357, at 369, 94 L.Ed. 401. (In the context of F.T.C. enforcement proceedings the court recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." In the enforcement proceedings the court's scrutiny extends to whether "the inquiry is within the authority of the agency"); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 at 209, 66 S.Ct. 494, at 505, 90 L.Ed. 614 (1946), (enforcement of subpoena issued by administrator under Fair Labor Standards Act enforced if "the investigation be for a lawfully authorized purpose"); *F.T.C. v. Miller*, 549 F.2d 452 (7th Cir. 1977) (refusal by court to enforce F.T.C. subpoena issued to "common carrier" exempt from F.T.C. investigatory jurisdiction under Section 6 of F.T.C. Act); *F.T.C. v. Winters National Bank*, 601 F.2d 395 (6th Cir. 1979) at 401-402, n.14, (if subpoena were issued pursuant to investigation of bank exempted from investigation under Section 6 of F.T.C. Act, court could not enforce it); *Appeal of F.T.C. Line of Business Report Litigation*, 595 F.2d 685 (D.C.Cir. 1978) at 703, (F.T.C. investigatory order to be enforced if "it does not transcend the agency's investigatory power, the demand is not unduly burdensome or too indefinite, and the information sought is reasonably relevant"); *Federal Election Com'n v. Machinists Nonpartisan*, 655 F.2d 380 (D.C.Cir. 1981)(before court could enforce F.E.C. subpoena it was required to assure itself of F.E.C.'s investigatory jurisdiction with respect to the subject matter of the subpoena; *United States v. Anaconda Co.*, 445 F.Supp. 486 (D.D.C.1977) at 491, n.4, (lack of investigatory jurisdiction of Consumer Product Safety Commission properly raised in subpoena enforcement proceeding where statute specifically limited this jurisdiction.)

Apart from its reliance on the holding of *Reisman v. Caplin,* supra, the analysis made by the Fifth Circuit in *Atlantic Richfield* also resulted in dismissal because the plaintiffs failed to establish a present need for relief under the *Abbot Laboratories* trilogy of Supreme Court decisions. Consequently, based on the *Abbott Laboratories* trilogy, this case is not ripe for judicial review.

Plaintiffs also contend that the very existence of the F.T.C. investigation causes them irreparable harm. They point to their expenses resulting from their legal battle in contesting the investigation as the harm which it imposes. Plaintiffs also allege that the fact that they are being investigated by the F.T.C. for possible unfair or deceptive practices will injure their business reputation and the good will of the public towards them. Plaintiffs' argument is not supported in the jurisprudence.

In *F. T. C. v. Standard Oil of California,* 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980), Standard Oil of California (SOCAL) sought a declaration that an F. T. C. complaint issued against it was illegal and asked for an order that this complaint be withdrawn. The complaint alleged that the agency had "reason to believe" that SOCAL was violating Section 5 of the F.T.C. Act. SOCAL alleged that the complaint was illegal because Section 5(b) of the Act, 15 U.S.C. § 45(b), requires that the F.T.C. have "reason to believe" that a person, corporation, etc. is engaged in illegal activity before the Commission may issue a complaint serving to trigger hearings into the activities of the recipient. SOCAL alleged that the F.T.C. had no basis for the statements set forth in the complaint, but had allegedly issued the complaint purely as a result of political pressure. The District Court dismissed the suit, but the Ninth Circuit reversed in an opinion reminiscent of plaintiffs' argument here. The Ninth Circuit held that if the F.T.C. had not in fact made a determination of whether there was "reason to believe" that SOCAL was guilty of the violations, then the proceedings were unlawful and SOCAL should not have to endure administrative prosecution by the F.T.C. and should not have to wait until after the administrative prosecution was completed to have a judicial review of whether or not the F.T.C. had had "reason to believe." *Standard Oil of California v. F.T.C.,* 596 F.2d 1381 (9th Cir. 1979). The Supreme Court disagreed and reversed the decision of the Ninth Circuit. Although the complaint alleging that the F.T.C. had "reason to believe" SOCAL was involved in illegal activities would appear to be far more stigmatizing than the receipt of a CID for the production of documents, and although the complaint initiated proceedings which immediately embroiled SOCAL in defending itself before an administrative law judge, the Supreme Court held that the issuance of the complaint was not "final agency action" under *Abbott Laboratories.* SOCAL did not have the option which Audubon and

Commercial Securities have of **[1369]** complying with a CID in order to avoid legal proceedings.

[2] Although the Court in *Standard Oil of California* indicated that it was basing its ruling on the lack of final agency action, much of its reasoning supports a holding that SOCAL was not unduly harmed by the administrative action. The Court stated that although the complaint did initiate proceedings against SOCAL, it did not have the same legal force as the regulation in *Abbott Laboratories,* nor did it have any comparable effect upon SOCAL's daily business. The Court recognized that the burden of responding to the charges of unfair competition is substantial, but it was said to be different in kind and legal effect from the burdens constituting final agency action. 101 S.Ct. at 494. Thus, the *Standard Oil of California* case refutes plaintiffs' argument that being subject to an investigation allegedly beyond the scope of agency authority is sufficient to warrant preenforcement review of its lawfulness. In *Standard Oil of California,* SOCAL alleged that the expenses and disruption of defending itself in protracted adjudicatory proceedings would irreparably injure it. Thus, it argued, the legality of the complaint should be reviewed immediately. The Supreme Court replied that though substantial, the "expense and annoyance of litigation is part of the social burden of living under government." 101 S.Ct. at 495. Legal expenses and business loses from contesting the legality of an agency investigation thus do not constitute irreparable harm such that will allow circumvention of statutory provisions for judicial review. In fact, in *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209, 58 S.CT. 834, 82 L.Ed. 1294 (1938), from which the Supreme Court drew the above quote, the Court discussed damages such as lost time of officials and employees, impairment of good will between management and employees impairing the efficiency of operations, as well as more direct costs arising as a result of an investigation allegedly beyond the jurisdiction of an agency. The Court said that these expenses are "not the sort of irreparable injury against which equity protects." 58 S.Ct. at 840. Thus, any harm to plaintiffs' business resulting from the stigma of being investigated will not be the result of definitive agency action requiring immediate and significant alteration of daily business in order to avoid heavy sanctions which include anathematization of plaintiffs' products or services. Plaintiffs face only "the social burden of living under government." 101 S.Ct. at 495.

The plaintiffs also complain that the notice which they received from the F.T.C. of its determination that certain practices are illegal causes them irreparable harm. Plaintiffs state that upon receipt of this notice from the F.T.C. that the F.T.C. considered misrepresentations that credit insurance was necessary to facilitate obtaining loans are illegal, plaintiffs became subject to fines for each violation which they thereafter commit under Section

5(m)(1)(B) of the F.T.C. Act, 15 U.S.C. § 45(m)(1) (B).[9] Plaintiffs have not alleged that they have made such misrepresentations in the past. In fact, plaintiffs allege that their procedures for insuring the voluntariness of purchases of credit insurance "far exceed the FTC's requirements." Plaintiffs merely allege that they are unable to predict how the F.T.C. will apply to finance companies its determinations that such practices are ille[1370]gal when done by car dealerships. The Court finds that this notice does not present plaintiffs with the dilemna which was the "purpose of the Declaratory Judgment Act to ameliorate" according to *Abbott Laboratories*.

[3] Plaintiffs also allege that regardless of the mandate required by cases such as *Atlantic Richfield*, this Court must hear this case because the F.T.C. is required to bring any contemplated enforcement proceedings as a compulsory counterclaim under Federal Rule of Civil Procedure 13(a).[10] In other words, plaintiffs seek to use Rule 13(a) to circumvent the requirements of reviewability and ripeness in a pre-enforcement action to halt an agency investigation. This position is unjustified. The framework of the F.T.C. Act and the policy behind Rule 13(a) compel this conclusion. Furthermore, the cases which have discussed this issue have unanimously rejected it.

[4] It is important to recognize that the purpose of Rule 13(a) is the prevention of a multiplicity of litigation. *Southern Construction Co. v. Pickard*, 371 U.S. 57, 60, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962). According to memoranda submitted by the F.T.C., 42 businesses other than the plaintiffs have received CID's pursuant to this investigation. Thus far, four other pre-enforcement actions have been filed in different districts across the country by various of these CID recipients.[11] To grant the request of plaintiffs in this regard would only serve to encourage more of these scattered preemptive attacks. On the other hand, Congress has established a statutory scheme for the enforcement of CID's which envisions that the F.T.C. will choose

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[9] 15 U.S.C. 45(m)(1)(B) states:

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) After such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

[10] Rule 13(a) provides that:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action; or (2) the opposing party brought suit upon his claim of attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

[11] *Credithrift Financial Inc., et al. v. FTC*, No. EV 81-206-C (S.D.Ind.; decision on cross motions for summary judgment pending); *Manufacturers Hanover Consumer Services, Inc. v. FTC*, No. 81-4418 (E.D.Pa., cross motions for summary judgment pending); *General Finance Corp. v. FTC*, No. 81-C6564 (N.D.Ill.; filed November 25, 1981); *Domestic Finance Corp. v. FTC*, No. 81-7579 (S.D.N.Y.; filed December 7, 1981).

the timing and venue of enforcement actions.[12] The wisdom of this scheme is demonstrated by the circumstances surrounding this investigation. Allowing the statutory enforcement procedure to function as intended will curtail the multiplicity of litigation and aid judicial economy, as demonstrated in *F.T.C. v. Manufacturers Hanover Consumer Services, Inc., et al.*, Misc. No. 81-363 (E.D.Pa., filed Dec. 4, 1981). In that case the F.T.C. brought a CID enforcement **[1371]** action joining six different finance companies pursuant to this investigation. One of these companies had already brought a pre-enforcement action against the F.T.C. Obviously, such a concentration of litigation in one action increases judicial efficiency. To inhibit such beneficial measures by indulging in premature adjudication of an unripe issue would be to fly in the face of the very objective of Rule 13(a). Under the F.T.C. Act, the Commission should have the option to seek enforcement of this CID in any one of the several judicial districts in Louisiana and Mississippi in which the plaintiffs transact business.

The jurisprudence on this question is in accord with the above observations. In *A.O. Smith v. F.T.C.*, 417 F.Supp. 1068 (D.Del.1976), the Court rejected the argument that the Commission's enforcement action is a compulsory counterclaim to a pre-enforcement suit. The Court stated that to rule otherwise would be to "completely eviscerate the Congressionally-mandated enforcement mechanism." 417 F.Supp. at 1088. Furthermore, it would encourage the filing of pre-enforcement actions in numerous judicial districts and result in duplicative determination of the same issues. In *F.T.C. v. Carter*, 464 F.Supp. 633 (D.D.C.1979), the Court refused to dismiss an action to enforce an F.T.C. subpoena where the recipients claimed that the action should have been brought as a compulsory counterclaim to their pre-enforcement challenge in another district. The Court said that this objection was "totally without merit." 464 F.Supp. at 639. And, in *In Re FTC Patterns Report Litigation*, 432 F. Supp. 274 (D.D.C.1977), the Court refused to consider a compulsory process enforcement action to be a compulsory counterclaim to a pre-enforcement challenge, saying at p. 284:

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[12] Both section 20(c) of the F.T.C. Act, 15 U.S.C. § 57b-1(e) and its legislative history appear to treat the timing and venue of enforcement proceedings as discretionary with the F.T.C. Section 20(c) states that "Whenever any person fails to comply with any civil investigative demand ... the *Commission* ... *may* file, in the district court of the United States for *any* judicial district in which such person *resides, is found,* or *transacts business* . . ." (Emphasis added.)

In Senate Report No. 96-500, 1980 U.S. Code Cong. and Adm. News, p. 1102 at 1126, the Senate Commerce, Science, and Transportation Committee indicated the responsibility which it expected the F.T.C. to exercise in bringing enforcement actions:

> In an investigation involving companies located in one region but in more than one forum, every consideration should be given to bringing enforcement proceedings in a forum convenient to the members of the industry being investigated. The Committee expects the Commission to act responsibly in selecting such a forum.

The ability of the F.T.C. to choose forums conducive to the convenience of the industry investigated (as opposed to individual businesses) would obviously be frustrated by allowing each individual CID recipient to force the premature assertion of the enforcement claim.

Acceptance of the corporate parties' argument would mean that companies seeking to resist FTC orders might well be able to choose the forum and place of the litigation simply by bringing pre-enforcement actions. These pre-enforcement actions could, as here, be brought in more than one forum. The implications of the corporate parties' contentions might work more to encourage than discourage duplicative litigation, and thus ultimately result in impeding the policy objectives of Rule 13(a).[19] The consequences of a ruling in the corporate parties'' favor could be undesirable and unwarranted.

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[19] The corporate parties suggest that duplicative litigation could be avoided by normal procedures: motions for change of venue and coordination under the guidelines of the Judicial Panel on Multi-District Litigation. This argument does not meet, however, the FTC's concern at being forced to raise or lose its enforcement claims at times and places indicated by companies' pre-enforcement actions. At best, this relief would come at a later time, after the FTC has been forced to submit to the companies' timing for asserting enforcement claims. (Footnote contained in Court's opinion.)

See also: *Caleshu v. United States,* 570 F.2d 711 (8th Cir. 1978); *Pfeiffer Co. v. U.S.,* 518 F.2d 124 (8th Cir. 1975).

Plaintiffs cite but one case as a purported example of what they ask this Court to do. However, *Wearly v. F.T.C.,* 462 F.Supp. 589 (D.N.J. 1978), vacated at 616 F.2d 662 (3d Cir. 1980), stands for the contrary proposition.

Since the Court finds that review of this matter is unavailable at this stage of the controversy, it is therefore unnecessary to consider either the F.T.C.'s contention that Audubon Life lacks standing to sue or the motions by both plaintiffs and the defendants for summary judgment on the merits of this case.

THEREFORE:

IT IS ORDERED that the motion of defendants to dismiss this action be and it is hereby GRANTED.

DAIRYMEN, INC.
v.
FEDERAL TRADE COMMISSION, et al.*

Nos. 81-5411, 81-5679 FTC Docket No. 9143

United States Court of Appeals, Sixth Circuit
July 30, 1982

Where FTC's investigation of agricultural cooperative's acquisition of a privately-owned dairy processor was not clearly beyond agency's jurisdiction nor contrary to specific statutory prohibition, lack of "final agency action" precluded judicial review of cooperative's claim of exemption.

Federal Trade Commission's investigation to determine whether or not agricultural cooperative's acquisition of privately owned dairy processor violated federal antitrust laws or Federal Trade Commission Act was not on its face in excess of FTC's delegated powers or contrary to specific statutory prohibition; thus requirement of Administrative Procedure Act of final agency action before judicial review precluded judicial consideration of cooperative's claim of exemption until completion of FTC proceedings.

Dairy cooperative appealed from two judgments of the United States District [377] Court for the Western District of Kentucky, Thomas A. Ballantine, Jr., J., and Charles M. Allen, Chief Judge, denying interlocutory relief from proceedings initiated by the Federal Trade Commission. The Court of Appeals, George Clifton Edwards, Jr., Chief Judge, held that FTC's investigation to determine whether or not agricultural cooperative's acquisition of privately owned dairy processor violated federal antitrust laws or Federal Trade Commission Act was not on its face in excess of FTC's delegated powers or contrary to specific statutory prohibition; thus, requirement of Administrative Procedure Act of final agency action before judicial review precluded judicial consideration of cooperative's claim of exemption until completion of FTC proceedings.

Affirmed.

(Syllabus, with substituted caption, taken from 684 F.2d 376.)

D. Paul Alagia Jr., Joseph M. Day, John S. Keck, Barnett & Alagia, Louisville, Ky., *Richard A. Gladstone, WIlliam S. Glading, Barnett, Alagia & Carey, Morton Pollander,* Washington, D.C., for plaintiff-appellant in both cases.

Ronald E. Meredith, Acting U.S. Attorney, Louisville, Ky., *Michael Tilley, Ann D. Nunn, John R. Wilson,* Assistant U.S. Attorneys, *Ted Hoppock,* F.T.C., Washington, D.C., for defendants-appellees in No. 81-5411.

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*Reported in 684 F.2d 376 (1982). *Cert. denied,* June 6, 1983.

Morton Hollander, Barnett, Alagia & Carey, Washington, D.C., for plaintiff-appellant in No. 81-5679.

Joanne L. Levine, F.T.C., Washington, D.C., for defendants-appellees in both cases.

Ernest J. Isenstadt, W. Dennis Cross, Howard E. Shapiro, F.T.C. Washington, D.C. for defendants-appellees in No. 81-5679.

Before EDWARDS, *Chief Judge,* KENNEDY, *Circuit Judge,* and CELEBREZZE, *Senior Circuit Judge.*

GEORGE CLIFTON EDWARDS, JR., *Chief Judge.*

Appellant Dairymen, Inc. appeals from two judgments denying it interlocutory relief from certain proceedings initiated by the Federal Trade Commission. In July 1980, the FTC issued an administrative complaint against Dairymen, an agricultural cooperative, after it had acquired Farmbest Foods, Inc., a dairy processor that had been privately owned, as opposed to cooperatively owned. The complaint alleged that the acquisition by its anticompetitive effect, violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. Dairymen filed and the ALJ denied a motion to dismiss the complaint on the ground that agricultural cooperatives were exempt (under the Capper-Volstead Act, § 6 of the Clayton Act, and § 20(a) of the FTC Improvements Act of 1980) from the federal antitrust laws and the jurisdiction of the FTC. Dairymen then brought an action in the United States District Court for the Western District of Kentucky seeking a temporary restraining order barring any further administrative proceedings against it.

The District Judge issued a temporary restraining order and subsequently conducted a hearing as to whether a preliminary injunction should issue. Thereafter, the District Judge handed down a decision denying the preliminary injunction and dissolving the temporary restraining order. He held that no final agency action had [378]been taken that might call for judicial review under § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704 (1976). Subsequently a similar action was filed by Dairymen before another District Judge in the Western District of Kentucky who likewise dismissed the complaint for lack of final agency action, adding as alternative grounds the doctrines of res judicata and collateral estoppel in light of the preceding District Judge's decision.

We believe that these appeals present one dispositive issue, namely, whether the requirement of "final agency action" forbids judicial consideration of Dairymen's claim of exemption from the antitrust laws and the Federal Trade Commission Act until completion of the FTC proceedings. We hold that it does.

Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The first of the District Judges who heard this matter, Judge Thomas A. Ballantine, Jr., held as follows:

> It is significant that the relief sought here is not judicial review of an agency decision, but rather a stay of the administrative discovery process pending a ruling on the motion to dismiss. However, at the hearing, counsel for DI expressed an intention to seek judicial review should the FTC decide against DI on its motion for interlocutory review. The Court notes that judicial review in such a case would no doubt be precluded by the doctrine of exhaustion of administrative remedies, *McKart* [v. *United States,* 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)], and the absence of a "final agency action" as required by Section 10(c) of the Administrative Procedure Act, 5 U.S.C. Section 704. [*FTC v. Standard Oil Co.,* 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980)].

The second of the District Judges, Judge Charles M. Allen, found as follows:

> In the interest of judicial economy, however, we express the alternative opinion that the matter must be dismissed for lack of jurisdiction due to lack of final agency action. While we do not quarrel with the principle that there exists an exception to the requirement of final agency action when the agency is operating beyond its jurisdiction, this case does not present the opportunity to decide this issue on legal grounds alone.

This court agrees with the reasoning set forth above by each of the two named District Judges. *Cf First National Monetary Corp. v. Commodity Futures Trading Commission,* 677 F.2d 522, 526 (6th Cir. 1982) (requirement of "final agency action" bars interlocutory judicial intervention when claim is that agency should proceed by rulemaking rather than adjudication).

We do not believe that Dairymen's reliance on *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), is appropriate. The *Leedom Court* authorized an exception to the general rule that forbids judicial interference with the regular course of administrative proceedings. In that case, the NLRB combined professional and nonprofessional employees in the same bargaining unit without the former's consent. This despite the fact that § 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1), declared that

> the Board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not pro[379]fessional employees unless a majority of such professional employees vote for inclusion in such unit.

An original suit was brought by the professional employees in federal district court to set aside the NLRB's action. The Supreme Court held that lack of completion of the prescribed administrative process did not bar the suit in district court.

> [The suit] is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory. . . . Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

358 U.S. at 188-89, 79 S.Ct. at 183-84.

Dairymen argues that § 20(a) of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 393, negates FTC jurisdiction, grants immunity from prosecution, or otherwise prevents the Commission from proceeding against any agricultural cooperative. Section 20(a) provides as follows:

> The Federal Trade Commission shall not have any authority to use any funds which are authorized to be appropriated to carry out the Federal Trade Commission Act (15 U.S.C. 41 et seq.) for fiscal year 1980, 1981, or 1982, under section 24 of such Act, as amended by section 17 and as so redesignated in section 13, for the purpose of conducting any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Act entitled "An Act to authorize association of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291 et seq.), commonly known as the Capper-Volstead Act, is not a violation of any Federal antitrust Act or the Federal Trade Commission Act (15 U.S.C. 41 et seq.).

Recent cases have limited the *Leedom* exception to the exhaustion requirement to jurisdictional defects which are apparent on the face of the record, *California ex rel. Christensen v. FTC,* 549 F.2d 1321, 1324 (9th Cir.), *cert. denied,* 434 U.S. 876, 98 S.Ct. 227, 54 L.Ed.2d 156 (1977); *see generally FPC v. Louisiana Power & Light Co.,* 406 U.S. 621, 647, 92 S.Ct. 1827, 1841, 32 L.Ed.2d 369 (1972); *Boire v. Greyhound Corp.,* 376 U.S. 473, 480, 84 S.Ct. 894, 898, 11 L.Ed.2d 849 (1964), and in plain contravention of a statutory mandate, *Coca-Cola Co. v. FTC,* 475 F.2d 299, 303 (5th Cir.), *cert. denied,* 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed.2d 122 (1973).

Our reading of § 20(a) simply does not agree with that urged upon us by Dairymen. As we understand the FTC proceeding, it is an investigation to determine whether or not Dairymen's conduct in acquiring Farmbest was a violation of federal antitrust laws or the Federal Trade Commission Act. Such a proceeding cannot be said to be in plain contravention of a statutory mandate on the face of the record before us. The mandate of § 20(a) is unlike the explicit prohibition contained in § 9(b)(1) of the NLRA, which was central to *Leedom*.

Dairymen also argues that the Secretary of Agriculture has exclusive jurisdiction over Capper-Volstead agricultural cooperatives to initiate Sherman or Clayton Act prosecutions. It is clear, however, that the Secretary's jurisdiction is not exclusive. *Maryland and Virginia Milk Producers Association, Inc. v. United States,* 362 U.S. 458, 462-63, 80 S.Ct. 847, 851, 4 L.Ed.2d 880 (1960) (Department of Justice); *United States v. Borden Co.*, 308 U.S. 188, 205-06, 60 S.Ct. 182, 191, 84 L.Ed. 181 (1939) (Department of Justice). Whether the FTC stands on the same footing as the Department of Justice under *Milk Producers* and *Borden* must initially be determined by the administrative agency. Once again it is not apparent on the face of the record that the FTC is acting "in excess of its delegated powers and contrary to a specific [statutory] prohibition." *Leedom v. Kyne,* 358 U.S. at 188, 79 S.Ct. at 183. **[380]**

The judgments previously entered in the two District Courts in the Western District of Kentucky are hereby affirmed.

Maryland also argues that the Secretary of Agriculture has exclusive jurisdiction over Capper-Volstead agricultural cooperatives to initiate Sherman or Clayton Act prosecutions. It is clear, however, that the Secretary's jurisdiction is not exclusive. *Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 462-63, 80 S.Ct. 847, 851, 4 L.Ed.2d 880 (1960) (Department of Justice); *United States v. Borden Co.*, 308 U.S. 188, 205-06, 60 S.Ct. 182, 191, 84 L.Ed. 181 (1939) (Department of Justice). Whether the FTC stands on the same footing as the Department of Justice under *Milk Producers* and *Borden* must initially be determined by the administrative agency. Once again it is not apparent on the face of the record that the FTC is acting "in excess of its delegated powers and contrary to a specific [statutory] prohibition." *Leedom v. Kyne*, 358 U.S. 184, 188, 79 S.Ct. 180, 184, 3 L.Ed.2d 210 (1958).

The judgments previously entered in the two District Courts in the Western District of Kentucky are hereby affirmed.

Defendants argue that § 2005 [illegible] immunity from prosecution [illegible] against any agricultural cooperative. Section 2005 provides as follows:

> The Federal Trade Commission shall not have any authority [illegible] Federal Trade Commission Act [illegible]

Several cases have limited the [illegible] exemption [illegible]

This reading of § [illegible] by [illegible] the FTC proceeding [illegible] a violation of federal antitrust law by the Federal Trade Commission [illegible] on the face of the [illegible] was related to *Borden*.

FEDERAL TRADE COMMISSION
v.
MANUFACTURERS HANOVER CONSUMER SERVICES, INC.
CREDICO FINANCIAL, INC.,
GENERAL FINANCE CORP., DOMESTIC FINANCE CORP.,
BARCLAYSAMERICAN CORP., POSTAL FINANCE CORP.*

MANUFACTURERS HANOVER CONSUMER SERVICES, INC.
v.
FEDERAL TRADE COMMISSION*

DOMESTIC FINANCE CORPORATION
v.
FEDERAL TRADE COMMISSION*

Misc. No. 81-363, Civ. A. Nos. 81-4418, 82-0656 FTC File No. 802 3199

United States District Court, Eastern District of Pennsylvania
August 3, 1982

Since parties would not be unduly prejudiced by confining their challenge to pending FTC enforcement proceeding, their extra-enforcement actions were dismissed.

Extraenforcement actions brought by consumer finance companies seeking equitable relief from civil investigative demands by the Federal Trade Commission were dismissed since the parties would not be unduly prejudiced by confining their challenge to the FTC's pending enforcement proceeding.

The Federal Trade Commission petitioned for enforcement of civil investigative demands served on certain consumer finance companies, and the finance companies brought action seeking equitable relief from the FTC investigation. On FTC's motion to dismiss and on the parties' cross motions for summary judgment, the District Court, Shapiro, J., held that finance companies would not be unduly prejudiced by confining their challenge to the investigation to FTC's pending enforcement proceeding.

Motions for dismissal granted; motions for summary judgment denied.

(*Syllabus, with substituted caption, taken from 543 F.Supp. 1081*)

Leslie Rice Melman, Federal Trade Commission, Washington, D.C., for defendant F.T.C.

Cecelia F. Wambold, Duane, Morris & Heckscher, Philadelphia, Pa. and *Joseph W. Gelb, Weil, Gotshal & Manges*, New York City, for plaintiff Domestic Finance Corp.

Edward F. Mannino, Philadelphia, Pa., for plaintiff Manufacturers Hanover Consumer Services, Inc.

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*Reported in 543 F.Supp. 1071 (1982).

Before **Shapiro**, *District Judge:*

MEMORANDUM

These cases concern a Federal Trade Commission ("FTC") investigation of disclosure policies and procedures of consumer finance companies regarding the sale of credit insurance in connection with consumer loan transactions. The FTC's general investigatory powers, *see* U.S.C. § 46(a), include the issuance of civil investigative demands ("CID") to compel production of documents, interrogatory answers and testimony for the purpose of ascertaining whether a person is engaged in unfair or deceptive acts or practices. *See* 15 U.S.C. [1072] § 57b-1. Forty-three CID's were issued nationwide in this particular investigation. Twenty-two recipients have complied.

Manufacturers Hanover Consumer Services ("Hanover"), Credico Financial, Inc. ("Credico"), General Finance Corporation ("General"), Domestic Finance Corporation ("Domestic"), Barclaysamerican Corporation ("Barclays") and Postal Finance Company ("Postal") are among the twenty-one recipients that have resisted the CID's at the administrative or judicial level. Hanover, Credico, General, Domestic, Barclays and Postal contend that their participation in the sale of credit insurance in connection with consumer loan transactions constitutes "the business of insurance" as that phrase is used in the McCarran-Ferguson Act and Federal Trade Commission Act limitations on FTC jurisdiction.[1]

Three actions are before this court. The FTC has petitioned for enforcement of CIDs issued to these companies. *FTC v. Manufacturers Hanover Consumer Services, Inc.*, Misc. No. 81-363 (E.D.Pa., filed December 4, 1981). We will refer to this petition as the "enforcement action." Hanover and Domestic each have brought actions seeking equitable relief from the

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[1] The McCarran-Ferguson Act provides that:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012

The FTC Act, as amended May 28, 1980, provides in relevant part:

> *Additional powers of Commission*
>
> *The Commission shall also have power—Investigations of persons, partnerships, or corporations*
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations. . . .
>
> *Investigations of foreign trade conditions; reports*
>
> (h) . . . Nothing in this section (other than the provisions of clause (c) and clause (d)) shall apply to the business of insurance, except that the Commission shall have authority to conduct studies and prepare reports relating to the business of insurance. The Commission may exercise such authority only upon receiving a request which is agreed to by a majority of the members of the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Energy and Commerce of the House of Representatives. The authority to conduct any such study shall expire at the end of the Congress during which the request for such study was made.

15 U.S.C. § 46.

FTC investigation. *Manufacturers Hanover Consumer Services, Inc. v. FTC,* No. 81-4418 (E.D.Pa., filed October 28, 1981); *Domestic Finance Corp. v. FTC,* No. 82-656 (E.D.Pa., filed December 7, 1981).[2] These actions will be referred to as the "extra-enforcement actions." The enforcement and extra-enforcement actions were consolidated.[3] In addition, three respondents to the enforcement petition, General, Barclays and Postal sought declaratory and injunctive relief from the FTC's investigation in a separate extra-enforcement suit filed in the Northern District of Illinois. *General Finance Corp. v. FTC,* No. 81-C-6564 (N.D.Ill., filed Nov. 23, 1981).[4] This extra-enforcement ac**[1073]**tion has since been dismissed. *Id.* (filed June 23, 1982).[5]

The FTC's enforcement petition and respondent Credico's motion for declaratory judgment in the enforcement action are under advisement. This opinion deals not with the merits of that petition but with the anomalous procedural posture of this case in which we find the same parties contesting in extra-enforcement actions, brought here and in the Northern District of Illinois, the same issues as those raised in the enforcement action filed in this District. Before the court in the extra-enforcement actions of Hanover and Domestic are the FTC's motions to dismiss or in the alternative motions for summary judgment, and plaintiffs' cross-motions for summary judgment. For the reasons discussed below, we decline to exercise jurisdiction over the actions brought by Hanover and Domestic and these extra-enforcement actions will be dismissed.

I. DISCUSSION

A CID is analogous to an investigative subpoena. *See FTC v. International Diamond Corp.,* No. 81-29 (N.D. Cal., filed January 4, 1982). Resort to a court by recipients of investigative subpoenas *before* an action for enforcement has commenced is disfavored. *Reisman v. Caplin,* 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964); *Wearly v. FTC,* 616 F.2d 662 (3d Cir.), *cert. denied,* 449 U.S. 822, 101 S.Ct. 81, 66 L.Ed.2d 25 (1980). The teachings of *Wearly* apply to extra-enforcement review rather than merely to pre-enforcement review, for "the significant question is not when the instant action was filed or acted upon vis-a-vis the enforcement proceeding, but whether declaratory relief should be made available outside the channels normally provided for the challenge of agency action." *Exxon Corp. v. FTC,* 588 F.2d 895, 901 (3d Cir. 1978). The CID statute allows the FTC to petition the district court for the enforcement of a CID. 15 U.S.C. § 57b-1(e). The court has jurisdiction to hear and determine the matter and to enter such orders as may be required. 15 U.S.C. § 57b-1(h). Any final order so entered is subject to appeal. *Id.*; 28 U.S.C. 1291. Disobedience of any final order "shall" be punished as a contempt of court. 15 U.S.C. § 57b-1(h). Thus, Congress has provided to Hanover and Domestic a remedy, defense to this enforcement proceeding, and their extra-enforcement actions appear premature. In *General Motors v. Volpe,* 457 F.2d 922 (3d Cir. 1972), in which General Motors sought extra-enforcement judicial review of a National Highway Safety Board order mandating the correction of defects, the Court held that the district court had properly refused to exercise jurisdiction because there was an adequate opportunity to defend the pending enforcement action. So here the FTC's investigation can and is being challenged in the enforcement proceeding pending before this court.

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[2] Domestic filed its action in the Southern District of New York. By stipulation and order dated February 4, 1982, the case was transferred to this District.

[3] *See* Orders dated January 15, 1982 and February 25, 1982.

[4] At least two other extra-enforcement actions concerning this FTC investigation on behalf of persons not parties to these consolidated cases are pending. *Audubon Life Insurance Co. v. FTC,* No. 81-952-B (M.D.La., filed November 20, 1981); *Credithrift Financial, Inc. v. FTC,* No. EV-81-206-C (S.D.Ind., filed October 15, 1981).

[5] By orders dated January 15, 1982 and April 13, 1982, proceedings against General, Barclays and Postal were temporarily severed and stayed and the parties were given leave to brief the issue of transfer to the Northern District of Illinois. The court was considering in the alternative a severance and stay pending the disposition of the Illinois action. That issue is now moot and the stay will be vacated.

The exception to the rule disfavoring extra-enforcement review is based on two considerations: (1) whether the issue raised was fit for judicial resolution, because no further factual development was necessary or the agency action was final; and (2) whether plaintiffs faced the dilemna of refusing to comply in the face of serious civil or criminal penalties or complying at substantial costs. *Wearly, supra* at 666. Whether or not the issuance of a CID is a "final" agency action, and we doubt it, *see, FTC v. Standard Oil Co.,* 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980), we think it clear that in light of statutory provisions for enforcement hearings, appeals and, if appropriate, stays pending appeal, Hanover and Domestic face neither immediate civil or criminal penalties nor immediate, substantial costs of compliance. They face no dilemna warranting relief prior to enforcement proceedings. **[1074]**

Hanover and Domestic will not be unduly prejudiced if this challenge is confined to the pending enforcement proceeding. *See, General Motors, supra* at 923.The FTC has rightly conceded that we may reach respondent's jurisdictional defense notwithstanding the rule that, to avoid delay in investigations, issues of statutory jurisdiction are ordinarily *not* to be resolved in subpoena enforcement actions. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *ICC v. Gould,* 629 F.2d 847 (3rd Cir. 1980), *cert. denied,* 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981). Subpoenas have been enforced so long as the FTC's jurisdiction is "clouded but not plainly spurious." *FTC v. Swanson,* 560 F.2d 1, 2 (1st Cir. 1977); *see also, FTC v. Texaco,* 555 F.2d 862 (D.C. Cir.) (*en banc*), *cert. denied,* 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977).

However, the provisions of the McCarran-Ferguson and FTC Acts cited by respondents raise a colorable jurisdictional defense to an FTC *investiga-*

tion. In *FTC v. Miller,* 549 F.2d 452 (7th Cir. 1977), the Court held that a jurisdictional defense based on a pre-existing FTC Act investigatory exemption, that for common carriers, could be raised at a subpoena enforcement proceeding. *Accord, FTC v. Winters National Bank & Trust Co.,* 601 F.2d 395, 401-2 n.14 (6th Cir. 1979). *Miller* was cited in the legislative history of the FTC Act Section 46(h) investigatory exemption, pertaining to "the business of insurance," for the following proposition:

> The amendment contemplates that, in determining what lies within the 'business of insurance,' the FTI [sic] will adhere to the judicial precedents. However, the Committee also recognizes that reasonable differences of opinion may exist with regard to whether certain peripheral activities of insurance companies or agents are the 'business of insurance.' The amendment is thus intended to permit judicial review on jurisdictional questions as now permitted under the court decisions construing the existing exemptions from section 6. See e.g., *FTC v. Miller,* 549 F.2d 452 (7th Cir. 1977).

S.Rep.No. 96-500, 96th Cong., 1st Sess. 15 (1970). The *Miller* exception is applicable here.

Miller listed three factors compelling deviation from the settled rule: (1) the agency had clearly violated a right secured by statute; (2) the issue was strictly legal, not involving factual determination or agency expertise; and (3) the issue could not be raised upon judicial review of a later agency order. *Miller, supra* at 460.

The last factor is clearly present here. The statutory exemption involves the right to be free from investigation, as opposed to regulation; the respondents cannot be effectively protected by judicial review of a subsequent agency action. The second *Miller* factor is also present, for the determination of whether the respondents' suspect practices constitute the business of insurance requires no further factual determination[6] or FTC expertise. However, in *Miller,* the FTC admitted that respondent was a common carrier within the meaning of the statutory exemption. A statutory right had been clearly violated. Whether respondents fall within the investigatory exemption is at issue here.

Nonetheless, the jurisdictional defense is properly raised in this enforcement action. The FTC's assertion of investigatory authority rests upon an interpretation of the FTC Act which does not depend on any facts sought to be obtained by subpoena. *In FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380 (D.C.Cir.), *cert. denied,* 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981), the Court considered and accepted respondents' jurisdictional defense at the subpoena enforcement stage of an FEC investigation. The underlying issue was whether a "draft-Kennedy" group was subject to the FEC's contribution limits. *Machinists, supra* at 386 n.7. Among the factors cited to support consideration of a jurisdictional defense was that the issue of whether "draft" groups were "political **[1075]** committees'' under the FEC Act stood or fell on a purely legal claim and that the additional facts sought by FEC subpoena would not alter the FEC's legal assertion. *Id.* at 389-90.[7] The CID's issued by the FTC seek information about corporate structure, policies and procedures, aggregate statistics about consumer loans and the sale of credit insurance, and a sample of loan contracts. Resolution of the respondents' claim to an investigatory exemption does not depend on the information demanded.

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[6] No party seeks discovery on respondents' jurisdictional status.

As Hanover and Domestic face no immediate penalty—criminal, civil or financial—and as neither will be prejudiced by defending the enforcement action, the FTC's motions for dismissal in the extra-enforcement actions will be granted and Hanover and Domestic's motions for summary judgment will be denied without prejudice to their rights to resist enforcement in the FTC action still pending.

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[7] *Machinists* appears inconsistent with *FTC v. Ernstthal*, 607 F.2d 488 (D.C.Cir. 1979), where the court refused to consider the jurisdictional defense at a subpoena enforcement hearing because whether a dental association was a corporation within the meaning of the FTC Act was a ''factual question of 'classification'.'' *Id.* at 491. However, the court relied heavily on the fact that the dental association was not a party to the investigation. *Machinists* and the case before this court are distinguishable on this ground.

UNITED STATES
v.
JS&A GROUP, INC., et al.*

No. 81 C 4967 FTC File No. 792 3108

United States District Court, Northern District of Illinois
August 4, 1982

In a civil penalties action, court granted defendants' motion to amend its earlier order so as to permit an immediate appeal of its ruling denying defendants' motion to dismiss. Court held that while it would still rule that relevant statutes provide government with authority to collect civil penalties for violations of FTC's rule concerning mail order merchandise and obtain permanent injunctive relief against future violations of that rule, defendants were entitled to appellate review of the interlocutory order. Their motion to dismiss involved questions of law that are controlling; there were substantial grounds for differences of opinions on the legal questions discussed in court's previous order; and the litigation would be terminated should the Court of Appeals disagree with instant court's conclusions on those questions. Court stayed further proceedings on the matter pending a final decision by the Court of Appeals for the Seventh Circuit.

Margaret C. Gordon, U.S. Atty., for plaintiff.
Victor E. Grimm, Chicago, Ill., for defendants.

MEMORANDUM OPINION and ORDER

DECKER, *District Judge*: On April 26, 1982, this court entered a memorandum opinion and order denying defendants' motion to dismiss. In its order the court considered two legal issues, first, whether the United States could collect civil penalties under 15 U.S.C. § 45(m)(l)(A) for violations of the Federal Trade Commission rule concerning mail order merchandise, and second, whether the United States could obtain permanent injunctive relief under 15 U.S.C. § 53(b) against future violations of the mail order rule. The court concluded that both types of relief were authorized by the relevant statutes and both were available to the government in the instant case. Pending is defendants' motion to amend the court's order to allow an immediate appeal as authorized by 28 U.S.C. § 1292(b).

Section 1292(b) provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

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*Reported in Trade Reg. Rep. ¶ 65,066 at 70,975 (1982-83 Trade Cases).

As is evident from the statute, there are three criteria that must be met before the requirements of Section 1292(b) are satisfied: (1) the order must involve a controlling question of law, (2) there must be substantial ground for difference of opinion on the legal question, and (3) a decision on the legal question may materially advance the ultimate termination of the litigation. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979,* 526 F.Supp. 226, 233 (N.D.Ill 1981). The court also recognizes that certification under Section 1292(b) is an exception to the normal rule that interlocutory orders are not appealable, and the court should not grant certification except in rare and unusual cases. *Id.* See *Seven-Up Co. v. O-So Grape Co.,* 197 F.Supp. 167 (S.D.Ill. 1959). The court believes that this is one such case.

Two of the three requirements of Section 1292(b) require little comment here. The parties agree that defendants' motion to dismiss involves questions of law that are controlling. Defendants have challenged the legal rights of the government to both types of relief that it is seeking in this litigation. Should the Court of Appeals disagree with this court's conclusion on those issues, this litigation would be terminated. See 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.22[2] (2d ed. 1982).

The requirement that a decision on the legal question may materially advance the termination of the litigation is closely tied to the controlling question requirement. As noted, a decision favorable to the defendants would result in the immediate termination of this suit. The government's allegations here cover almost three years and involve some 22,000 alleged violations of the mail order rule. Defendants have denied that they ever violated the rule and have alleged a number of affirmative defenses. It is clear that discovery and trial will be expensive and time-consuming. Those difficulties may be avoided if the court certifies its order under Section 1292(b).

The controversy between the parties on this motion is centered on the requirement that there be substantial grounds for a difference of opinion on the legal questions discussed in the court's order. The government argues that there is no likelihood whatsoever, much less a substantial likelihood, that defendants will be successful in getting this court's order overturned. Essentially reviewing the arguments that they made in their original motion to dismiss, defendants argue to the contrary.

The court concludes that defendants' position is correct. Though the court still believes that its original position was correct, particularly in light of Congress' effort to strengthen the enforcement powers of the Federal Trade Commission in the Magnuson-Moss Act, see April 26, 1982 order at 7-8, the court does believe that there is substantial ground for differences of opinion on the issues. See *Brown v. Texas & Pacific Railroad Co.,* 392 F.Supp. 1120, 1126 (W.D.La. 1975). As the court noted in its earlier opinion, the civil penalties provision is ambiguous. In addition, Congress' intent is nowhere expressly stated, and it appears that Congress never directly considered the extent to which the civil penalties provision should apply to previously promulgated fair trade rules. Finally, it appears that this is the first case to consider many of the arguments raised by defendants. Contrary to the government's suggestion, the law here is not settled.

Finally, the court likewise does not believe that the authority of the government to obtain a permanent injunction barring further violations of the mail order rule is settled, despite the existence of some decisional law favorable to the government's position. Furthermore, if that is the only relief available to the government, the size and complexity of this suit will be dramatically decreased.

For the reasons stated above, defendant's motion to amend the court's April 26, 1982, order is granted. The court finds that its earlier order meets the requirements of 28 U.S. § 1292(b), and defendants are entitled to request the Seventh Circuit Court of Appeals for leave to appeal. Further proceedings in this court will be stayed, pending the final decision of the Court of Appeals.

[illegible] under which the civil penalty provision [illegible] promulgated fair trade [illegible]. Finally, it appears that [illegible] the first time to consider many [illegible] trary to the government's suggestion [illegible]

Finally, the court [illegible] and the [illegible] government to obtain a [illegible] further [illegible] despite the [illegible] the government [illegible] only [illegible] and completely [illegible]

[illegible] of the reasons set forth above, defendants' motion to amend the court's April 26, 1982, order is granted. The court finds that its earlier order meets the requirements of 28 U.S.C. § 1292(b) and defendants are entitled to request the Court of Appeals [illegible] of appeal [illegible]. Further proceedings [illegible] will be stayed pending the [illegible]

[illegible] of the government to [illegible] Should the Court of Appeals [illegible] with [illegible] conclusion on these issues, this litigation would be [illegible]. See 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 110.22[2] (2d ed. 1982).

The requirement that Congress [illegible]

[illegible]

The same [illegible] that defendants' [illegible] Congress [illegible] of the Federal Trade [illegible] to the Magnuson-Moss Act. [illegible] April 26, 1982 order [illegible] See Brown v. Texas & Pacific Railroad [illegible] As the [illegible] opinions, [illegible] it appears that Congress [illegible]

UNITED STATES
v.
ALLIED PUBLISHERS SERVICE, INC.*

No. CV-F-81-46 REC FTC File No. 782 3035

United States District Court, Eastern District of California
August 10, 1982

After considering the Magistrate's recommendations of April 7, 1982, Court issued an order denying defendants' motion to dismiss counts two and three of the complaint, for failure to state a claim upon which relief could be granted. Court held that Section 5(m)(l)(B) of the FTCA does not violate defendants' due process rights and is therefore not unconstitutional, based on its finding that prior FTC cease and desist orders used in Section 5(m)(l)(B) action may be subject to judicial review in appropriate cases.

ORDER

By COYLE, *District Judge*:

On April 7, 1982, the Honorable A.D. Christensen, United States Magistrate, recommended that this court deny defendants' motion to dismiss counts two and three of the complaint for failure to state a claim upon which relief can be granted. Defendants have filed objections to the recommendation.

The court has reviewed all of the pleadings and the recommendation and agrees that defendants' motion should be denied. Further, the court agrees with the Magistrate that the Supreme Court cases relied upon by defendants are not dispositive of the constitutional issue raised. The court, however, respectfully disagrees with the Magistrate that the constitutional question can be avoided. The court has reviewed the relevant statutory provisions and case law and concludes that Section 5(m)(l(B) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(l)(B) does not violate defendants' due process rights and therefore, is constitutional.

This conclusion is based on the court's finding that prior FTC cease and desist orders used in a section 5(m)(l)(B) action may be the subjects of judicial review in appropriate cases. The court agrees with the Magistrate that Section 15 U.S.C. § 56(a)(2)(C)[1] supports this conclusion. Moreover, this court relies on the principle that "only upon a showing of 'clear and convincing evidence' of a contrary intent should the courts restrict access to judicial review." *Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). The court has found no such "clear and convincing evidence of a contrary intent" in the Federal Trade Commission Act or its legislative history. The fact that Section 5(m)(l)(C), 15 U.S.C. § 45(m)(l)(C) provides for a *de novo* trial on issues of fact does not preclude a finding that the Act permits judicial review of questions of law concerning prior FTC orders. *Abbott Laboratories, supra,* at 141.

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*Not otherwise reported.

[1] The Magistrate's recommendation cites this section incorrectly as 15 U.S.C. § 56(a)(2)(B) due to a typographical error.

The court does not find it necessary to rule on the scope of judicial review available to defendants in a Section 5(m)(l)(B) action at this time. Defendants have not yet challenged the validity of prior FTC orders in this court.

THEREFORE, IT IS HEREBY ORDERED that defendants' motion to dismiss counts two and three of the complaint is denied.

MAGISTRATE'S RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS COUNTS TWO AND THREE OF THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants Allied Publishers Service, Inc., Charles E. Noble, Michael F. Sheehan, Larry M. Beckwith, and Joseph P. Mosey, Jr., have moved to dismiss counts two and three of the complaint for failure to state a claim upon which relief can be granted. The motion came on regularly for hearing before the Honorable A.D. Christonsen, United States Magistrate. James M. Phillips, Esq., of the law firm of Baker, Manock & Jensen, appeared and argued on behalf of defendants Allied Publishers Service, Inc., and individual defendant Joseph P. Mosey, Jr.; John E. Peterson, Esq., of the law firm of Thomas Snell, Jamison, Russell, Williamson & Asperger, appeared and argued on behalf of defendants Charles E. Noble, Michael F. Sheehan, and Larry M. Beckwith; Robert R. Donlan, Esq., Attorney, Consumer Affairs Section, Antitrust Division, United States Department of Justice, appeared and argued on behalf of plaintiff the United States of America; and Marcia A. Johnson, Attorney, Consumer Affairs Section, Antitrust Division, United States Department of Justice, appeared on behalf of plaintiff the United States of America. Following oral argument, the motion was taken under submission for recommendation of the Court.

It is the recommendation of the Court to the Honorable M.D. Crocker, United States District Judge, that defendants' motion to dismiss counts two and three be denied.

I

In five proceedings under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), the Federal Trade Commission ("FTC" or "Commission") issued final cease and desist orders, dated between 1958 and 1971, declaring that certain acts or practices in the sale of merchandise or services in commerce are unfair and deceptive and therefore unlawful under Section 5(a)(l) of the FTC Act, 15 U.S.C. § 45(a)(l). In eleven other proceedings under the Act, the Commission determined that certain acts or practices used in the collection of debts in commerce are unfair and deceptive and therefore unlawful and, by orders dated between 1943 and 1968, demanded that the various individuals and business entities whose acts and practices had been complained of cease and desist from engaging in such acts or practices. Since their effective dates, these sixteen cease and desist orders have remained in full force and effect against the individuals and business entities, their representatives, agents, and employees, against whom they were issued. Defendants herein, however, were not parties to any of the Commission's sixteen determinations.

On June 30, 1978, the Commission sent to each defendant herein, by certified mail, return receipt requested, copies of the sixteen FTC decisions, accompanied by a letter which in relevant part reads as follows:

> On January 4, 1975, the Federal Trade Commission Act was amended to provide that a person, partnership, or corporation is liable for civil penalties of $10,000 per violation for engaging in acts or practices which the Commission has determined to be deceptive or unfair in prior cease and desist proceedings. 15 U.S.C. Section 45(m)(l)(B). A copy of the relevant statutory provision is enclosed.
>
> This letter, together with the enclosed Federal Trade Commission decisions, is to inform you of certain sales and debt collection practices which the Commission has found unlawful under Section 5(a)(l) of the Federal Trade Commission Act, 15 U.S.C. Section 45(a)(1), and to notify you of the potential liability of a business for civil penalties under the above-described statutory provision if a business is, in fact, engaged in them.
>
> In order to avert possible action by the Federal Trade Commission, you should immediately insure that you are not engaged in any of the practices proscribed by the enclosed decisions.

The Commission's letters, together with enclosures, were received by defendant Mosey on July 3, 1978, and by defendants Allied Publishers Service, Inc., Noble, Sheehan, and Beckwith on July 5, 1978.

On February 5, 1981, plaintiff filed this civil action in the United States District Court for the Eastern District of California, Fresno Division, alleging as the second and third causes of action, respectively, (1) that since on or about July 5, 1978, and continually thereafter, in the course of their business, (a) defendants have engaged in the acts or practices which the Commission in its five sale-of-merchandise-or-services determinations had declared to be unfair and deceptive and (b) defendants, at the time they committed those acts or practices, had actual knowledge that such acts or practices are unfair or deceptive and unlawful under Section 5(a)(l) of the FTC Act, 15 U.S .C. § 45(a)(l); and (2) that since on or about July 5, 1978, and continually thereafter, in the course and conduct of their business, (a) defendants have engaged in the acts or practices determined to be unfair and deceptive in the Commission's eleven collection-of-debts rulings, and (b) defendants, at the time they committed those acts or practices, had actual knowledge that such acts or practices are unfair or deceptive and unlawful under Section 5(a)(l) of the FTC Act, 15 U.S.C. § 45(a)(l).

II

The statutory authority under which the Commission brings its second and third causes of action is Section 5(m)(l)(B) of the FTC Act, 15 U.S.C. § 45(m)(l)(B), which provides as follows:

> If the Commission determines in a proceeding under subsection (b) [15 U.S.C. § 45(b)] that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—
>
> (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(l) of this section [15 U.S.C. § 45].
>
> In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

Defendants contend that the above provisions violate the Due Process Clause of the Fifth Amendment to the United States Constitution which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

A

Defendants' present motion to dismiss counts two and three for failure to state a claim upon which relief can be granted rests on two arguments: (1) that the Commission's attempt to impose penalties against defendants for allegedly engaging in practices which the Commission has deemed to be unlawful, unfair, and deceptive in prior agency adjudications in which defendants were not parties violates defendants' rights to due process of law guaranteed by the Fifth Amendment to the United States Constitution, and (2) that the Commission's attempt to impose penalties against defendants complied with neither the rulemaking procedures nor the adjudication procedures set out in the Commission's own regulations, thus violating defendants' right to administrative due process.

As their first argument, defendants begin from the premise that notice and right to be heard requirements of the Due Process Clause apply to all actions taken by administrative agencies, both rulemaking and adjudication. Defendants contend that the manner in which they conduct their business amounts to a liberty interest and property right subject to the due process guarantees of the Fifth Amendment, and furthermore that they enjoy a liberty interest in being free from such "labels of infamy" as are alleged in the second and third causes of action, to wit, that defendants have engaged in "unlawful, unfair, and deceptive business practices." Defendants round out their first argument by asserting that the Commission's present attempt to impose civil penalties against defendants pursuant to 15 U.S.C. § 45(m)(l)(B) for allegedly engaging in business activities which the Commission has deemed to be unlawful, unfair, and deceptive in sixteen prior agency adjudications to which defendants were not parties deprives defendants of their liberty interest and property right without notice and right to be heard, in violation of the Due Process Clause of the Fifth Amendment.

As their second argument, defendants contend that neither the rulemaking requirements of Section 18(b)(l) of the FTC Act, 15 U.S.C. § 57(b)(l), and of 16 C.F.R. § 1.7 *et seq.* nor the adjudication requirements of 15 U.S.C. § 45(b) and 16 C.F.R. § 3.2 *et seq.*, are or can be complied with by plaintiff Commission's present attempt to impose civil penalties against defendants pursuant to § 45(m)(l)(B) for allegedly engaging in business activities which the Commission has deemed to be unlawful, unfair, and deceptive in sixteen prior agency determinations to which defendants were not parties, and therefore such attempt to impose civil penalties violates defendants' right to administrative due process.

In support of these arguments, defendants assert that it is a "well established rule" that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency" (*quoting from SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); *and citing NLRB v. Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267, 293-94, 94 S.Ct. 1757, 1771, 40 L.Ed. 2d 134 (1974); and *NLRB v. Wyman-Gordon Company*, 394 U.S. 759, 772, 89 S.Ct. 1426, 1433, 22 L.Ed. 2d 709 (1969) (concurring opinion of Justices Black, Brennan, and Marshall)).

To place this "well established rule" in perspective it is helpful to evaluate the contexts in which it has been authoritatively articulated. In *SEC v. Chenery Corp., supra,* 332 U.S., at 194, the Court was confronted with the question whether, in announcing and applying a new standard of conduct in an adjudicative proceeding, the SEC was required to promulgate a rule which would be in nature prospective only, with no retroactive effect on the situation being adjudicated. After pointing out that administrative agencies, unlike courts have the ability to make new law prospectively through the exercise of rule making powers and that, therefore, such agencies have less reason to rely upon ad hoc adjudication to formulate new standards of conduct, the Court reasoned that the function of filling the interstices in a federal statute should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect, added the Court, would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. An administrative agency must be equipped to act either by general rule or by individual order, reasoned the Court, adding that where problems facing an agency are reasonably unforseeable or beyond the agency's experience or so specialized and varying in nature as to elude resolution by general rule, the agency must retain power to deal with the problem on a case-by-case basis if the administrative process is to be effective. The Court announced, therefore, that there is thus a very definite place for the case-by-case evolution of statutory standards and that the choice made between by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. From that the Court held that the SEC, faced with a new problem, rightfully could utilize an adjudicatory proceeding to announce and apply a new standard of conduct which indeed would have retroactive effect, applicable to the party whose acts were then being adjudged.

In *NLRB v. Wyman-Gordon Company, supra,* [hereinafter "Wyman-Gordon"] the Court addressed the questions (1) whether in the course of adjudicatory proceedings, the NLRB could avoid the notice and publication requirements of the Administrative Procedure Act ("APA") in promulgating rules to be obeyed by the affected public and (2) what the nature of adjudicated cases is in the administrative process and how such cases may serve as precedents. The judgment of the Court was announced in plurality. Justice Fortas announced the judgment of the Court and delivered an opinion in which Chief Justice Warren, Justice Stewart, and Justice White joined. In their opinion, the Court's decision to the effect that the rule-making provisions of the APA may not be avoided by the process of making rules in the course of adjudicatory proceedings rested on the fact that although adjudicated cases may and do serve as vehicles for the formulation of agency policies and generally provide a guide to action that the agency may be expected to take in future cases, and although such administrative opinions may serve as precedents (subject to the qualified role of *stare decisis* in the administrative process), they do not establish "rules" in the sence that they must, without more, be obeyed by the affected public. Concurring in the result, Justice Black, joined by Justices Brennan and Marshall, set forth an opinion which articulates reasoning substantially different from that advanced by Justice Fortas. After pointing out that administrative agencies' quasi-legislative and quasi-judicial powers are not always separated by a clear line and in fact merge at many points—citing, for example, the instance where in exercising its quasi-judicial function an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem—the concurring opinion declares that if an agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power. *Id.*, at 770-71, 89 S.Ct., at 1432. The concurring justices refer to the National Labor Relations Board's quasi-legislative and quasi-judicial powers as "separate but almost inseparably related," *Id.*, at 771, 89 S.Ct. at 1432, citing to various provisions of the National Labor Relations Act. The Justices declare that "[n]o language in the National Labor Relations Act required that the grant or the exercise of one power was intended to exclude the Board's use of the other." *Id.* And turning to the APA, the Justices continue, "[n]or does any language in the Administrative Procedure Act require such a conclusion" *Id.* After referring to the APA definitions of "adjudication" and "order" and pointing out that it is true that the adjudicatory approach frees an administrative agency from the procedural requirements specified for rulemaking, the concurring Justices clarify that the APA not only permits this whenever the action involved can satisfy the definition of "adjudication" (i.e., "agency process for the formulation of an order") but imposes separate procedural requirements that must be met in adjudication (including notice of the issues, an opportunity for responsive pleadings, a hearing, and decision). The concurring Justices conclude from this that under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either "rule making" or "adjudication" under the APA, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication. The Justices cite to *SEC, supra,* and point out that though that decision did not involve the Labor Board or the APA, it is "equally applicable here"—"'the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.'" *Id.*, at 772, 89 S.Ct., at 1433, *quoting SEC, supra,* at 203, 67 S.Ct., at 1580. The Justices thereupon proceed to disagree with the conclusion of the prevailing opinion concerning the validity and effect of the "Excelsior rule" or "Excelsior requirement" and its applicablity to the *Wyman-Gordon* case. (*See Wyman-Gordon, supra,* at 769, n.1, 89 S.Ct., at 1431, n.1.)

The *Excelsior* case, *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), had involved union objections to the certification of the results of elections that the unions had lost at two companies. The companies had denied the unions a list of the names and addresses of employees eligible to vote. In the course of the proceedings, the Labor Board "invited certain interested parties" to file briefs and to participate in oral argument of the issue whether the Board should require the employer to furnish lists of employees. 156 N.L.R.B., at 1238. Various employer groups and trade unions did so, as *amici curiae.* After these proceedings, the Board issued its decision in *Excelsior.*

As the prevailing opinion in *Wyman-Gordon* states it, the *Excelsior* decision

> purported to establish the general rule that such a list must be provided, but it declined to apply its new rule to the companies involved in the *Excelsior* case. Instead, it held that the rule would apply 'only in those elections that are directed, or consented to, subsequent to 30 days from the date of [the] decision.'

Wyman-Gordon, supra, at 763, 89 S.Ct., at 1428, *citing* 156 N.L.R.B., at 1240, n.5. The *Wyman-Gordon* prevailing opinion further states that "[s]pecifically, the Board purported to establish 'a requirement that will be applied in all election cases. That is, . . . the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all eligible voters. . . .'" *Id., citing* 156 N.L.R.B., at 1239-40. The prevailing opinion pointed out that the First Circuit Court of Appeals had held the Board order against the Wyman-Gordon Company to be invalid because it was based on a rule laid down in *Excelsior* which had not been promulgated in accordance with the requirements that the APA prescribes for rule making. The Board in *Wyman-Gordon* had sought reversal of the First Circuit by asking the Supreme Court to hold that the Board has discretion to promulgate new rules in adjudicatory proceedings, without complying with the rule-making requirements of the APA. The *Wyman-Gordon* prevailing opinion rejected the argument that the *Excelsior* command was a valid substantive regulation, was adopted in a proceeding in which the requirements for valid adjudication had been met, and hence was binding upon the Wyman-Gordon Company. Said the prevailing opinion in *Wyman-Gordon,* "[t]his argument misses the point." *Wyman-Gordon, supra,* at 765, 89 S.Ct., at 1429. The opinion emphasizes that in *Excelsior* the Board had "purported to make a rule: i.e., to exercise its quasi-legislative power." *Id.* The prevailing opinion in *Wyman-Gordon* therefore announces that because the Board "did not even apply the rule it made [in the *Excelsior* case] to the parties in the [*Excelsior*] adjudicatory proceeding" (*id.*), the *Excelsior* requirement cannot be considered to amount to a "rule" applicable, without more, to the affected public. Rather, the "rule" at most might amount to a vehicle for the formulation of agency policies, a guide to action that the agency may be expected to take in future cases, a precedent subject to the qualified role of *stare decisis* in the administrative process. The prevailing opinion then holds that the Wyman-Gordon Company itself was specifically directed by the Board to submit a list of the names and addresses of its employees for use by the unions in connection with the election. This specific direction to the company itself, which was part of the order directing that an election be held, is "unquestionably valid," says the *Wyman-Gordon* prevailing opinion. *Wyman-Gordon, supra,* at 766, 89 S.Ct., at 1430.

> Even though the direction to furnish the list was followed by the citation to 'Excelsior Underwear Inc., 156 N.L.R.B. No. 111,' it is an order in the present [*Wyman-Gordon*] case that the respondent was required to obey.

> Absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so.

Wyman-Gordon, supra, at 766, 89 S.Ct., at 1430. The *Wyman-Gordon* prevailing opinion concludes that because the Board in an adjudicatory proceeding had directed the respondent itself to furnish the list, the Board's order was indeed valid, notwithstanding the validity and effect of the *Excelsior* rule as one of only limited applicability in future cases.

The concurring opinion of Justice Black in the *Wyman-Gordon* decision disagrees with the prevailing opinion's criticism of the procedure followed by the Board in the *Excelsior* case of adopting its requirement that employers supply unions with the names and addresses of their employees prior to an election. Moreover, the *Wyman-Gordon* concurring opinion rejects what it calls the "novel theory by which the [prevailing] opinion manages to uphold enforcement of the *Excelsior* practice in spite of what [the prevailing Justices] consider[ ] to be statutory violations present in the procedure by which the requirement was adopted." *Wyman-Gordon, supra,* at 769, 89 S.Ct., at 1431. The concurring Justices' opinion expresses the view that the *Excelsior* practice was adopted by the Board as a legitimate incident to the adjudication of a specific case before it pursuant to the proper exercise of its adjudicatory powers under Sections 9(c)(l) and (2) of the Labor Relations Act to conduct investigations, hold hearings, and supervise elections to determine the exclusive bargaining representative that the employees wish to represent them. The concurring Justices in *Wyman-Gordon* state that

> [t]he prevailing opinion seems to hold that the *Excelsior* requirements cannot be considered the result of adjudication because the Board did not apply it to the parties in the *Excelsior* case itself, but rather announced that it would be applied only to elections called 30 days after the date of the *Excelsior* decision. But the *Excelsior* order was nonetheless an inseparable part of the adjudicatory process. * * * [T]he decisions whether [in an adjudicatory setting] to accept a "new" requirement urged by one party and, if so, whether to apply it retroactively to the other party are inherent parts of the adjudicatory process. . . . If the Board were to decide, after careful evaluation of all the arguments presented to it in [an] adjudicatory proceeding, that it might be fairer to apply the practice only prospectively, it would be faced with the unpleasant choice of either starting all over again to evaluate the merits of the question, this time in a "rule-making" proceeding, or overriding the considerations of fairness and applying its order retroactively anyway, in order to preserve the validity of the new practice and avoid duplication of effort. I see no good reason to impose any such inflexible requirement on the administrative agencies.

Wyman-Gordon, supra, at 774-75, 89 S.Ct., at 1434 (Black, J., concurring).

Justice Douglas' dissent in *Wyman-Gordon, supra,* at 775-780, 89 S.Ct., at 1434-37, considered the requirement in *Excelsior* to be a "rule" designed to fit all cases at all times . . . not particularized to special facts . . . a statement of far-reaching policy covering all future representation elections" *id.,* at 777, 89 S.Ct., at 1435, which therefore should have been subjected to the rule-making procedures required by, the APA. This had not been done and therefore, reasons Justice Douglas' dissent, the *Excelsior* rule itself was invalid and could not be invoked in the *Wyman-Gordon* case to validate the order directing respondent *Wyman-Gordon* to supply a list of employees.

In *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., supra,* ("Bell"), Justice Powell delivered the opinion of the Court (consisting of a majority of five justices—Chief Justice Burger, and Justices Powell, Rehnquist, Blackmun, and Douglas). *Bell* presented two questions, the second of which was whether the National Labor Relations Board, upon remand of the case from the Supreme Court, must proceed by rulemaking rather than by adjudication in determining whether certain buyers are "managerial employees" which determination would control whether the Bell Aerospace Co. was subject to the Board's order to hold a representative election. The Court answered in the negative. In *Bell,* a union had petitioned the N.L.R.B. for a representation election to determine whether the union would be certified as the bargaining representative of the 25 buyers in the purchasing and procurement department at the Bell Aerospace plant. The company opposed the petition on the ground that the buyers were "managerial employees" and thus were not covered by the Act. After the representation hearing, the Regional Director transferred the case to the Board and the Board issued a decision both holding that the company's buyers constituted an appropriate unit for purposes of collective bargaining and directing an election. The election was held and 15 of the buyers voted for the union, nine against, after which the Board certified the union as the exclusive bargaining representative for the company's buyers. The company contended, however, that the buyers, as "managerial employees," were not covered by the Act and refused to bargain with the union. An unfair labor practice complaint was filed and the Board thereupon found that the company had violated the Act and issued an order compelling the company to bargain with the union. Subsequently, the company petitioned the United States Court of Appeals for the Second Circuit for review of the order and the Board cross-petitioned for enforcement. The Court of Appeals, reversing the Board, denied enforcement. After reviewing the legislative history of the Taft-Hartley Act and concluding that Congress had intended to exclude all true "managerial employees" from the protection of the Act, the court acknowledged that there *was* substantial evidence that the company's buyers were *not* sufficiently high in the managerial hierarchy to constitute true "managerial employees," which would have led to enforcement of the Board's order. The court, nevertheless, denied enforcement of the order for two reasons, the second of which was that although the Board was not precluded from holding that buyers, or some types of buyers, were not "managerial employees," the court thought that, in view of the Board's long line of cases holding the contrary, it could not accomplish this change of position by adjudication. Rather, the Board should conduct a rule-making proceeding in conformity with the Act. The court therefore remanded the case to the Board for such a proceeding. The Board petitioned the Supreme Court for certiorari and the Supreme Court granted the petition.

The Supreme Court in *Bell* articulated the precise nature of the issue confronting it. Said the Court:

> The question is not whether the Board should have resorted to rulemaking, or in fact improperly promulgated a "rule", when in the context of the prior representation proceeding it held that the Act covers all "managerial employees" except those meeting the new "conflict of interest in labor relations" touchstone. Our conclusion that the Board applied the wrong legal standard [in determining the status of the buyers] makes consideration of that issue unnecessary. Rather, the present question is whether on remand [to properly determine the status of the buyers] the Board must invoke its rule-making procedures if it determines, in light of our opinion, that these buyers are not "managerial employees" under the Act. The Court of Appeals thought that rulemaking was required because *any* Board finding that the company's buyers are not "managerial" would be contrary to its prior decisions [footnote omitted] and would presumably be in the nature of a general rule designed "to fit all cases at all times."

Bell, supra, at 291-92, 94 S.Ct., at 1770 (emphasis in original). After reviewing the *SEC v. Chenery* and *N.L.R.B. v. Wyman-Gordon Co.* cases, the *Bell* Court states that the views expressed in those cases "make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *Bell, supra,* at 294, 94 S.Ct., at 1771.

In answer, therefore, to its question whether on remand the Board must invoke its rulemaking procedures if it determines that these buyers are not "managerial employees" under the Act, the *Bell* Court points out that, although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the *Bell* case would justify such a conclusion. "Indeed, there is ample indication," states the Court, "that adjudication is especially appropriate in the instant context," citing as reasons that there must be tens of thousands of manufacturing, wholesale, and retail units which employ buyers and hundreds of thousands of buyers, and that, because the duties of buyers vary widely depending on the company or industry, it is doubtful whether any generalized standard could be framed which would have more than marginal utility. In addition, the possible reliance of the industry on the Board's past decisions with respect to buyers, states the Court, does not portend adverse consequences so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Continues the Court,

> This is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative, for the Board has not yet finally determined whether these buyers are "managerial."

Bell, supra, at 295, 94 S.Ct., at 1772. After pointing out the rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course, the *Bell* court reaffirms that the Board has discretion to decide that the adjudicative process may also produce the relevant information necessary to mature and fair consideration of the issues: those most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination.

Justice White, joined by Justices Brennan, Stewart, and Marshall, dissent from other holdings in the *Bell* opinion but concur in the above opinion "insofar as it holds that the Board was not required to resort to rulemaking in deciding this case. . . ." *Bell, supra,* at 295, 94 S.Ct., at 1772.

Thus the "well established rule"—that the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency—has been cited by the Supreme Court in support of the following two holdings: (1) the SEC, faced with a new problem, rightfully can utilize an adjudicatory proceeding to announce and apply a new standard of conduct which has retroactive effect, applicable to the party whose acts are being adjudicated (*SEC v. Chenery Corp., supra*); and (2) on remand from federal Court to the agency, the N.L.R.B. need not invoke its rulemaking procedures once it determines whether the party is indeed subject to its order because those most immediately affected, the buyers and the company in the particular case, are accorded full opportunity to be heard before the Board makes its determination (*Bell, supra*). The "well established rule" likewise is relied upon in the concurring opinion in *Wyman-Gordon, supra.* The judgment of the *Wyman-Gordon* Court was set forth in a prevailing opinion and a concurring opinion. The prevailing opinion announces that where a company itself is specifically directed by the N.L.R.B. to submit a list of names and addresses of its employees for use by the unions in connection with an election, this direction, when part of the order directing that the election be held, is unquestionably valid and need not be further justified or validated by reliance on a "rule" emanating from a prior adjudication involving other parties, which rule amounts to merely a vehicle for the formulation of agency policies, a guide to action that the agency may be expected to take in future cases, and a precedent something short of that embodied in "rules" which are forged through the rulemaking process and which must, without more, be obeyed by the affected public (*Wyman-Gordon, supra*). The concurring opinion, relying on the "well established rule," reasons that because the National Labor Relations Board's quasi-legislative and quasi-judicial powers are "separate but almost inseparably related", and because the APA (1) permits an adjudicatory approach which frees an administrative agency from the procedural requirements specified for rulemaking whenever the action involved can satisfy the definition of "adjudication" and (2) imposes separate procedural requirements that must be met in adjudication, an agency decision reached under the adjudicatory power, if it becomes a precedent, guides future conduct in much the same way as though it were a new rule promulgated under the rulemaking power. This concurring opinion in *Wyman-Gordon* does not state explicitly whether such agency decision guides future conduct only of the entity which is party to the adjudication or of other entities as well.

Indeed, the holdings in *SEC, supra,* and *Bell, supra,* do not forclose either possibility. Those cases merely address the applicability of the "well established rule" to the situation where parties directly involved in adjudication before an administrative agency are subject to a "new rule" emanating from the adjudicative proceeding. The *SEC* and *Bell* opinions are silent on the question of the applicability of the "well established rule" to the situation where parties not at all involved in the adjudication might subsequently be subject to a "new rule" emanating from the adjudicative proceeding. And the concurring opinion in *Wyman-Gordon, supra,* is likewise silent (at least in its language) as to the applicability of the "well established rule" to parties other than the very parties involved in the adjudication. To be sure, the *Wyman-Gordon* Court was concerned with the applicability of the *Excelsior* "decision" or "rule" to the Wyman-Gordon Company. But according to the concurring Justices, the principal issue was whether the *Excelsior* requirement itself had been achieved through proper adjudicatory procedures. The concurring Justices expressed the view that, because as inherent parts of the adjudicatory process, a "new" requirement had been urged by one party and applied against the other party, the adjudicatory process had been properly employed in *Excelsior*. The fact that the Board had decided that the election involved there should not be set aside and in a written opinion explained its reasons for rejecting the unions' claim, did not render the adjudicative process invalid. And the fact that the order issued by the Board in *Excelsior* was to be applied only to elections called 30 days after the date of the *Excelsior* decision did *not* transform it into a mere "purported rule," invalid for failure to be retroactive only. To the concurring Justices, the fact that the requirement *was* applied to the parties subject to the adjudication was a saving feature. Although the *language* of the concurring opinion in *Wyman-Gordon* is silent on the question of the applicability of the *Excelsior* requirement to parties other than those involved in the *Excelsior* adjudication the underlying message of the concurring opinion is unmistakeable—the *Excelsior* requirement has effect on other parties.

The prevailing opinion in *Wyman-Gordon* was explicit, however the *Excelsior* decision purported to make a rule as binding as the rule that emanates from the rulemaking process, but it failed to follow the rulemaking provisions of the APA and therefore cannot be applicable, without more, to the affected public.

Thus, after defendants herein concede that the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency, they are quick to point out that once an agency has decided to act by adjudication, rather, than by rulemaking, the agency is prohibited from applying the determination set forth in that administrative adjudication prospectively against the general public. This assertion by defendants (*see* Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion To Dismiss for Failure to State a Claim for Relief, at 8:8-13) only appears at first blush to be supported by the authorities defendants quote from and cite to throughout their argument (*Id.*, at 8:13-12.8).

Citing *Wyman-Gordon, supra,* at 764 and 765-66, 89 S.Ct. 1429-30, defendants quote the Supreme Court's statement that

> [t]he rulemaking provisions of [the Administrative Procedure Act], which the Board would avoid, were designated to assure fairness and mature consideration of rules of general application. [citations omitted]. They may not be avoided by the process of making rules in the course of adjudicatory proceedings. *There is no warrant in law for the Board to replace the statutory scheme with a rulemaking procedure of its own invention.* Apart from the fact that the device fashioned by the Board does not comply with the statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act.

(Emphasis supplied.) Defendants fail to point out, however, that that statement was made in 1969, prior to the 1975 adoption of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub.L.No. 93-637, 88 Stat. 2183, of which Section 5(m)(l)(B), 15 U.S.C. § 45(m)(l)(B) is a part. Indeed it is true, in 1969 there was no warrant in law for the Board (N.L.R.B.) to replace the statutory scheme with a rulemaking procedure of its own invention. And in the *Wyman-Gordon* case, the prevailing opinion does declare that the "device fashioned by the Board"—a "purported rule" which, while fashioned out of an adjudicative proceeding must, without more, be obeyed by the affected public—"obviously falls short of the substance of the requirements of the Administrative Procedure Act" (publication, notice, and hearing of a general nature). In fact not only the prevailing opinion in *Wyman-Gordon* but the respective *dissenting* opinions of Justices Douglas and Harlan, as well, on this point, are in agreement: the *procedure* whereby the Board adopted its requirement in *Excelsior* fell short of the requirements of the APA. *See Wyman-Gordon, supra,* 394 U.S., at 775, 89 S.Ct., at 454-55 (Douglas, J., dissenting), and 394 U.S., at 780-81, 89 S.Ct., at 1437 (Harlan, J., dissenting). But the APA is not involved in the present case. Just as much as the APA is a creature of Congress, so too is Section 5(m)(l)(B) of this Federal Trade Commission Act, 15 U.S.C. § 45(m)(l)(B). The one Act, which is under consideration here, is not to be measured by the demands of the other Act, not under consideration here. Were the APA deemed to set forth both the *minimum* and the *only* due process requirements for agency functioning, such a comparison would be proper. But the measure of Section 5(m)(l)(B) must be against the Fifth Amendment, not the APA.

The citation by defendants to the Supreme Court's following statement is likewise inappropriate in the present case:

> Adjudicated cases . . . generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are 'rules' in the sense that they must, *without more,* be obeyed by the affected public.

Wyman-Gordon, supra, 394 U.S. at 731, 765-66, 89 S.Ct., at 1429 (emphasis supplied). The provisions of Section 5(m)(l)(B), together with the balance of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub.L.No. 93-637, 88 Stat. 2183 (1975), might indeed provide that additional element of due process contemplated by the word "more" in the quotation above. The question whether the procedure contemplated by the provisions of Section 5(m)(l)(B) does provide that additional element of due process is squarely before the court it cannot be averted by a discussion limited to the provisions of the APA or the statements of the Supreme Court prior to 1975 made in the absence of the Congressional statute presently under consideration. Defendants' citation to the Supreme Court's statement in *Bell,* that fines and damages were not involved there and that those most immediately affected are accorded a full opportunity to be heard, likewise are not controlling of the question presently before the court, for the determination has yet to be made whether fines or damages shall be assessed and whether the affected person here is afforded, by the provisions of Section 5(m)(l)(B), a full opportunity to be heard before the agency makes its determination.

It is true, as defendants argue, that "the establishment or reduction of constitutional rights cannot be accomplished by congressional action or executive fiat." (Memo. at 12:6-7, quoting *Clark v. Board of Education of Little Rock School Dist.,* 374 F.2d 569, 570 (8th Cir. 1967)). But whether Section 5(m)(l)(B) and its accompanying legislative provisions reduces defendants' constitutional rights has yet to be determined one way or the other. The mere commencement of a civil action pursuant to that section by the filing of a complaint reduces no constitutional rights, and the mere allegations of that complaint do not amount to "labels of infamy." Whether defendants' manner of conducting their business amounts to a liberty or property interest depends on whether under the Constitution and under the laws and regulations enacted in conformity thereto defendants are at liberty to conduct their business in the manner they do.

The question presented, therefore, is one of first impression. Stated in detail, the question is whether the Due Process Clause of the Fifth Amendment is violated by the provisions of Section 5(m)(l)(B), 15 U.S.C. § 45(m)(l)(B), which allow enforcement of the provisions of the Federal Trade Commision Act by the FTC by means of civil actions brought to obtain civil penalties against any person, partnership, or corporation which engaged in any unfair or deceptive act or practice (1) after a cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and (2) with actual knowledge both that such act or practice is unfair or deceptive and that it is unlawful either because it is an unfair method of competition in or affecting commerce or because it is an unfair or deceptive act or practice in or affecting commerce.

B

Defendants contend that the provisions of Section 5(m)(l)(B) indeed are violative of the Due Process Clause because they purport to authorize the Commission to deprive persons, partnerships, or corporations of their property right or liberty interest without either the general rulemaking safeguards of generally published notice; submission of data, views, and arguments; informal hearing; or general rule promulgation; or the particular adjudicative safeguards of the filing of a complaint, notice of a hearing, hearing, and right to appeal. These contentions are now squarely addressed.

For purposes of defendants' motion to dismiss the second and third causes of action of the complaint, the averments of these counts must be taken as true. 2A Moore's Federal Practice ¶ 12.08 (2d ed. 1979). This means that the court must assume that plaintiff United States will be able to prove all elements of a Section 5(m)(l)(B) violation in this case. It must be assumed, therefore, (1) that the Commission has determined in a proceeding under subsection (b) [15 U.S.C. § 45(b)] that any act or practice is unfair or deceptive; (2) that the Commission has issued a final cease and desist order with respect to such act or practice; (3) that after such cease and desist order becomes final defendants engaged in such act or practice (whether or not defendants were subject to such cease and desist order); (4) that defendants engaged in such act or practice with actual knowledge that such act or practice is unfair or deceptive; and (5) that defendants engaged in such act or practice with actual knowledge that such act or practice is unlawful either because it is an unfair method of competition in or affecting commerce or because it is an unfair or deceptive act or practice in or affecting commerce.

The ultimate and yet threshold issue that is raised here is whether, because the court is presented with the question of the validity of Section 5(m)(l)(B), it must either on the one hand pursue the inquiry respecting the power of Congress by directly addressing the constitutionality of the statute or on the other hand ascertain whether a construction of the statute is fairly possible by which the question of the statute's constitutionality may be avoided. Indeed, the question arises whether ascertaining a fairly possible construction of the statute is at all different from addressing the constitutionality of the statute. *See Cohens v. Virginia,* 6 Wheat 264, 404, 441 (1821); *Ashwander v. TVA,* 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring opinion); Gunther, "The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review." 64 Colum. L.Rev. 1 (1964). Plaintiff at oral argument on the present motion suggested that the approach preferable in the present case would be to presume the constitutionality of the statute and to seek out and accept some possible interpretation thereof which would render it constitutional. This, of course, is proper only if statutory interpretation indeed is available. Said Justice Brandeis in *Ashwander, supra,* at 348, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." This echoes Justice Marshall's statement in *Cohens; supra*—a case decided on the merits on the basis of statutory interpretation—that where such basis is available "it will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case." *Id.,* at 6 Wheat. 264, 441 (1821). And whether such basis is available in a given case is apparent from Chief Justice Vinson's warning in *Shapiro v. United States,* 335 U.S. 1, 31 (1948): "The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule [in statutory interpretation], give way where its application would produce a futile result, or an unreasonable result 'plainly at variance with the policy of the legislation as a whole.'" Thus, if in examining the nature of the provisions of Section 5(m)(l)(B), the fairly possible statutory interpretations available produce a futile result or an unreasonable result plainly at variance with the policy of the legislation as a whole, the constitutional question cannot be avoided. It is here that the rulings of the Supreme Court in *SEC, Wyman-Gordon,* and *Bell, supra,* are applicable. Insofar as those opinions are applicable to the statutory scheme of the FTC Act as it existed prior to the enactment of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub.L.No. 93-637, 88 Stat. 2183 (1975) and inasmuch as they stand for the proposition that, without more, an adjudicative procedure in one case cannot produce a "rule" of general applicability to entities not party to the adjudication, the provisions of Section 5(m)(l)(B) must be examined by an inquiry whether they by themselves establish sufficient Due Process guarantees to satisfy the dictates of the Constitution. If any fairly possible construction of Section 5(m)(l)(B), in furtherance of an answer to that inquiry, produces a futile result or an unreasonable result plainly at variance with the policy of the legislation as a whole, the constitutional question cannot be avoided.

Defendants attempt to show that any possible interpretation of Section 5(m)(l)(B) produces a futile result. They do this by pointing out that the statute sets forth neither the statutory or regulatory requirements necessary to valid rulemaking nor the statutory or regulatory requirements necessary to valid adjudication as otherwise provided for in the FTC Act and regulations promulgated thereunder. (Defendants' Memo. in Support, at 12:8 to 14:30). Plaintiff answers this contention with the argument that

> It is clear that within the context of a Section 5(m)(l)(B) action, prior determinations of the Commission as to what constitutes an unfair or deceptive practice may be viewed as binding "rules" only to those who have actual knowledge of them. Section 5(m)(l)(B) and Section 18 [the FTC Act's rulemaking provision, 15 U.S.C. § 57a] are separate and distinct features of the same legislative enactment, and there can be no ground for supposing that one was enacted in derogation of the other. [¶] Similarly, defendants' allegation that due process has been denied because the 5(m)(l)(B) proceeding does not follow FTC's own procedures for an adjudicatory proceeding under 16 C.F.R. § 3.2 *et seq.*, is erroneous. The procedures contained in Section 3.2 *et seq.*, are applicable to adjudicatory proceedings before the *Commission*, not before the district court.

Plaintiff's Opposition, at 22:22-23:3. In addition, plaintiff contends that defendants are entitled, by Section 5(m)(2), 15 U.S.C. § 45(m)(2), to a trial *de novo* on all issues of fact inasmuch as the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendants. This right to trial *de novo* entitles defendants to contest the evidence submitted by the government regarding their conduct and to present evidence that they lacked "actual knowledge" that their acts or practices were unfair or deceptive and unlawful. Moreover, plaintiff argues that defendants are entitled to appropriate judicial review of the prior sixteen determinations in the present district court civil action. States plaintiff, "[a]lthough Congress did not explicitly state in the 1975 Improvement Act that the enforcing court in a Section 5(m)(l)(B) proceeding could review the Commission's prior determination, the legislative history supports the conclusion that Congress intended some measures for review." (Plaintiff's Opposition at 17:11-15). Plaintiff thereupon proceeds to discuss the recognized availability of judicial review of a rule underlying a Section 5(m)(l)(*A*) civil penalty suit for infraction of a promulgated rule. Defendants seize upon this apparent lack of relevant legislative history, stating that

> Plaintiff contends that the opportunity for a trial de novo under [15 U.S.C.] § 45(m)(2) provides Defendants with a constitutionally adequate opportunity to be heard on the legal sufficiency of the FTC's prior determinations. . . . However, Plaintiff concedes that the wording of § 45(m)(2) does not itself provide for such review of the legal sufficiency of the FTC's prior determinations, and that there is no such indication in the legislative history of § 45(m)(l)(B) itself. . . . Instead, Plaintiff supports its conclusion by referring to the legislative history of a *different* statutory provision of the FTC Act and the conclusions of one commentator. . . .

Defendants' Response, at 5:15-27. True it is that plaintiff can only cite to a different statutory provision of the FTC Act to find legislative history supporting the view that indeed there is available judicial review of the prior determinations to determine whether they were reasonable in light of the purposes of the Act; but that "different" statutory provision, Section

45(m)(l)(A), was itself part of the Improvement Act. Nevertheless, placing this wholly aside, it must also be remembered that although defendants seek to be "guaranteed their constitutional right to challenge the propriety of the FTC's prior determinations" (Defendants' Response, at 7:10-11), the court is presently concerned only with whether there exists a fairly *possible* construction of Section 5(m)(l)(B) which does not produce a *futile* result or an unreasonable result plainly at variance with the *policy* of the legislation *as a whole*. In the absence of any legislative history or statutory provision indicating that review of the legal propriety of the prior FTC determinations is *not* provided for or *not* permitted, by the Act, a fairly possible construction of Section 5(m)(l)(B) nevertheless might indeed admit of such review. Looking at the policy of the legislation *as a whole,* the court cannot overlook the provisions of Section 16, 15 U.S.C. § 56, which significantly affect and qualify the provisions of Section 5(m), 15 U.S.C. § 45(m). Although cited neither by plaintiff nor by defendants, Section 16(a)(2)(B), 15 U.S.C. § 56(a)(2)(B), enacted as part of the Improvement Act, provides that in any civil action "to obtain judicial review of a rule prescribed by the Commission, *or a cease and desist order issued under section 5 of this Act* [15 U.S.C. § 45]" (emphasis added) the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action. Such a provision, while it does not guarantee judicial review of the legal propriety of the earlier Commission determinations, does speak of judicial review of a cease and desist order "issued under section 5 of this Act."[1] *Id.* Section 5, 15 U.S.C. § 45, provides for issuance of cease and desist orders against violating parties and civil penalties and judgment (not cease and desist orders) against the civil-action defendants against whom the cease and desist order is not issued. Granted, Section 16(a)(2)(B), 15 U.S.C. § 56(a)(2)(B), does not refer to who does or does not seek to obtain judicial review of a cease and desist order. But nothing in that statute indicates that the civil-action defendants are not contemplated as potential parties to such review. All that need be said at this point is that there exists the fair possibility that Section 5(m), 15 U.S.C. § 45(m) allows for judicial review of the legal propriety of the determinations at the instance of the civil-action defendants. It is worthy of note that in an analogous context, absent the Improvement Act provisions, a Section 5(l), 15 U.S.C. § 45(l), cease and desist order violation action for civil penalties cannot be the proceeding wherein the civil-action defendant attacks the validity or legality of the cease and desist order; such would constitute a collateral attack on a final order which stands as res judicata. *See, e.g., United States v. Post-Graduate School of Nursing, Inc.* 1963 C.C.H. Trade Cas. ¶ 70911 (D.C. Ill.); 24 A.L.R. Fed. 539, 560-61

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[1] Rulemaking is governed by Section 18, 15 U.S.C. § 57a and therefore in 15 U.S.C. § 56(a)(2)(C) the words "issued under section 5 of this Act" apply only to the phrase "or a cease and desist order" and not to the phrase "as rule prescribed by the Commission."

(§ 10e), and cases cited therein. And yet, the enactment of the FTC Improvement Act may be seen to have modified this very principle of res judicata within the context of the FTC Act enforcement scheme. It is worthy to note, though the parties herein do not mention it, that the newly enacted scheme contemplated by Section 5(m)(l)(B) serves not merely to *establish* some third, additional, new method of black letter law as defendants would characterize it, totally at variance with the two recognized methods of rulemaking in existence prior to 1975, (namely, congressional legislation and administrative rulemaking, where affected parties were and are entitled to participate in the legislative or rulemaking processes). Rather, the provisions of Section 5(m)(l)(B), as part of a larger statutory framework to the same effect, serves to *reallocate* the relationships among the already existing possible sources of applicable law. Prior to the 1975 enactment, the possible sources of applicable rules indeed were Congressional legislation on the one hand and administrative functioning on the other. But also prior to 1975 the latter of these two (the administrative procedures) allowed for two sources of law: quasi-legislation and quasi-adjudication. Although outside the administrative law context the concepts of legislation and adjudication differ markedly in that legislation is politically dependent and adjudication is politically independent, within the administrative law context both the quasi-legislative and the quasi-adjudicative functions are politically dependent. Whereas adjudication outside the administrative context is defined as the resolution of disputes, free of bias, adjudication within the administrative context is defined as the accomplishment of some substantive regulatory end (such as in the FTC context, preventing unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce). The 1975 Improvement Act serves merely to reallocate the powers of the quasi-legislative and quasi-judicial functions of the Federal Trade Commission, wholly within the administrative, political framework. The dangers that would inure if the allocation of power were between the separate branches of the federal government, as defendants would urge the court to perceive it, are not present in the legislation under consideration. The provisions of the 1975 Improvement Act leave the final legal resolution of the propriety of the agency determinations in the hands of the district court and merely reallocate, wholly within the administrative framework, the powers of the politically dependent sources of rules, the quasi-legislative and quasi-judicial sources. Whereas the separation of powers sought by the Constitutional framers would be ineffective if the Constitution had also authorized one of the branches of government—the Congress—to combine them if it wished, the separation of powers logically entails a more cumbersome and costly process than enactment of a statute for combining them: constitutional, not statutory, amendment. But this is not portended here. The final deprivation of defendants' property right or liberty interest does not occur at the resolution of an adjudication between other parties in a proceeding to which defendants were not parties, nor does it occur upon the filing of a complaint in a civil action for civil penalties. And neither does it inure in the final resolution of the factual and legal determinations made by the district court unless and until the due process rights of defendants, in the district court, are abridged. Congress did not, by the 1975 Act, even pretend to add to or take away from the politically independent judiciary's power to decide and administer that process which is due any and all persons, partnerships, and corporations. That the statute is silent on this point is not only not surprising but indeed expected. The question arising subsequent to the 1975 amendment, as properly should be seen from the defendants' point of view, is not *whether* the defendants can challenge the propriety of the agency's prior determinations, but *when*. Were the challenge to be afforded only in the rulemaking process, the statutory scheme would fly in the face of the already well-established genius of the administrative structure which embodies the combination of the functions of issuing rules, bringing cases, deciding cases, conducting studies, proposing legislation, and so forth. But defendants may challenge both the facts and the law in the district court, as the plaintiff concedes and in fact emphasizes in its points and authorities. Defendants' argument that they "have never been given an opportunity in any proceeding before the FTC to defend the business practices alleged by the FTC to be unlawful, unfair, and deceptive" (Memo. in Support, at 6:21-23) misses the point. To seek a decision before an administrative tribunal which, by its nature necessarily is political, is neither to defeat nor to further defendants' ultimate objective: the protection of substantial rights. Rather, to permit that the rules adopted by administrative adjudication be applicable to third parties in a district court civil penalties proceeding, subject to the due process requirements afforded in that unbiased, politically independent third branch of government, is merely to place some of the costs of challenging those administrative rules adopted through agency adjudication on the parties who indeed challenge those rules. It is only illusory to presume that the costs borne by parties against whom a civil action is brought differ in any significant way from the costs borne by interested parties seeking to influence rules adopted by administrative rulemaking. This reallocation of costs is wholly within the purview of the Congress. As Justice Cardozo said in a related context, "[i]t is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived." *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 42, 53 S.Ct., 431, 433, 77 L.Ed. 1015 (1933). The duty of the court here is merely to determine whether the legislation admits, through fairly possible interpretation, of a result that is neither futile nor unreasonable and plainly at variance with the policy of the legislation as a whole. It is the opinion of the court that the legislation does admit as much and thus the constitutional question need not be addressed. The resultant new necessity placed upon defendants of measuring their own conduct in light of written administrative adjudicatory opinions places them in no substantially different position than they are in when they must measure their own conduct in light of written administrative rules and regulations. Both procedures produce rules not wholly controlled by any one interested party's wishes. Both are subject to political pressures, and rightfully so. But this does not affect the due process guarantees found and exercised elsewhere in the regulatory mechanism. In light of the guidance set forth in the Supreme Court decisions as above analyzed, it appears that Congress has not overstepped its bounds. A purported rule adopted not in conformity with the procedural safeguards established by Congress is invalid and cannot be invoked in a later adjudication. But if that statutory law is amended—without doing violence to the separation of powers among the branches of government, as is the case here—and sets forth new procedures which can fairly be construed to do no violence either to already established due process guarantees or to reason or to the statutory scheme taken as a whole or to its policies, then a rule of law adopted pursuant to those new procedures is valid and can be invoked in a later adjudication. The applicability of the law to the facts in the later adjudication, and the question of what those facts are may be the subject of district court determination. The second and third counts of plaintiff's complaint ought each to be deemed to state a cause of action and therefore defendants' motion to dismiss should be denied.

HERBERT R. GIBSON, JR., GERALD P. GIBSON, GIBSON'S, INC., GIBSON'S DISCOUNT CENTERS, INC., IDEAL TRAVEL AGENCY, INC., GIBSON WAREHOUSE, INC. and GIBSON'S PRODUCTS CO., INC.

v.

FEDERAL TRADE COMMISSION*

H.R. GIBSON, SR., et al.

v.

FEDERAL TRADE COMMISSION*

Nos. 80-1743, 80-1746 FTC Docket No. 9016

United States Court of Appeals, Fifth Circuit
August 13, 1982

1. **Due process is not violated by combination of investigative and judicial functions within agency.**

Combination of investigative and judicial functions within agency does not violate due process.

2. **FTC staff attorney may participate in both the investigation and subsequent prosecution of a case.**

Participation of agency staff attorney in both investigation and subsequent prosecution of a case is permissible.

3. **Where administrative complaint had not been issued until 1975 and petitioners were partially responsible for the 13-year lapse between FTC's 1967 decision to investigate and the rendering of its opinion in the case, delay did not deprive respondents of due process.**

Antitrust petitioners were not denied due process by 13-year delay before the [555] Federal Trade Commission rendered an opinion in their case, although initial decision to investigate them occurred in 1967, since administrative complaint was not issued until 1975, and delay had to be credited in part to petitioners themselves.

4. **Respondents had expressly waived any objection to administrative law judge's participation knowing of his previous service as a Commission attorney-advisor and did not avail themselves of opportunity for further inquiry provided by FTC rules.**

Antitrust petitioners with explicit awareness of facts or at least of facts indicating necessity for further factual inquiry open to them under the Federal Trade Commission rules expressly waived any objection they might have had to participation of the administrative law judge who had previously served as an attorney advisor to the Commissioner.

5. **Bringing an objection to the attention of agency so that it could reconsider its position is the duty and responsibility of a party in litigation.**

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*Reported in 682 F.2d 554 (1982). *Reh. denied* September 13, 1982; *cert. denied* April 4, 1983. For case before the Commission, see 95 F.T.C. 553.

Party in administrative proceeding as in litigation in court, has duty and responsibility to bring to attention of agency an objection so that agency has opportunity to reconsider its position.

6. **Administrative law judges are governed by same policies that support timely objections or motions to disqualify judges.**

Same policies supporting timely objections or motions to disqualify judges are equally applicable to administrative law judges.

7. **No manifest injustice or prejudice to respondents stemming from participation of former FTC attorney-advisor serving as administrative law judge was indicated.**

There was no indication of any manifest injustice or prejudice to antitrust petitioners from participation of an administrative law judge who had previously served as attorney advisor to the Commissioner of the Federal Trade Commission.

8. **Only contemplation and invitation for concerted action along with acquiescence is necessary for a group boycott; no express mutual agreement to refuse to deal; is required.**

It is necessary for a group boycctt that there be an express mutual agreement to refuse to deal; contemplation and invitation for concerted action along with acquiescence is sufficient.

9. **FTC was not obliged to accept alternative explanations for decline in suppliers' sales volume where evidence that franchisees had informed suppliers' representatives that a boycott existed, along with the national letter and significant drop in suppliers' sales to franchisees supported FTC finding of a group boycott.**

Evidence that representatives of suppliers were told by petitioners' franchisees that there was a boycott, along with national letter and substantial drop in sales by supplier to franchisees amply supported Federal Trade Commission's finding of a group boycott and Commission was not bound to accept petitioners' alternative explanations for the drop in sales.

10. **FTC determination that sufficient commonality of interest and integration of petitioners' operations existed to warrant an order covering all defendants was supported by substantial evidence.**

There was substantial evidence to support Federal Trade Commission's determination that there was substantial commonality of interest and that operations of the petitioners were sufficiently integrated to require order covering all of the defendants.

11. **If supported by substantial evidence on record considered as a whole, FTC findings must be accepted.**

Findings of the Federal Trade Commission must be accepted if there is substantial evidence on record considered as a whole to support them.

12. **FTC may make the choice where there is possibility of drawing two inconsistent inferences from evidence.**

Where there is possibility of drawing two inconsistent inferences from evidence, Federal Trade Commission may make the choice.

13. **FTC findings that boycott of a petitioners' supplier continued until at least 1974 was supported by substantial evidence.**

Substantial evidence supported findings of the Federal Trade Commission that boycott of a supplier of the petitioners continued until at least 1974.

14. **In determining type of order necessary to remedy unfair practices, FTC has wide discretion.**

The Federal Trade Commission has wide discretion in determining type of order necessary to remedy unfair practices.

15. **FTC had satisfied the jurisdictional requirement of "sales in commerce;" underlying sales were in, not merely connected with, interstate commerce, where brokerage payments were allowances upon all supplier sales to family-owned and franchised stores in a 20-state area.**

Where brokerage payments were allowances upon all supplier sales to retail stores of petitioners, both family-owned and franchised, in a 20-state area, underlying sales were not merely connected with, but directly in, interstate commerce; thus, jurisdictional requirement of "sales in commerce" had been met by the Federal Trade Commission in proceeding on alleged violation of the Robinson-Patman Act. **[556]**

16. **Robinson-Patman Act requires no price discrimination and permits brokerage payments only for services rendered.**

The Robinson-Patman Act absolutely prohibits payment of brokerage except for services rendered and contains no requirement that price discrimination occur.

17. **Price discrimination is not required in dummy brokerage situations, in light of the language and purpose of the Robinson-Patman Act.**

In light of language and purpose of the Robinson-Patman Act, there is no requirement of a price discrimination in a situation of a dummy brokerage.

18. **As corporate head of products company and personal owner and operator of individual retail stores, one petitioner was a "buyer" within meaning of the Robinson-Patman Act.**

One petitioner was a buyer within context of his personal ownership and operation of individual retail stores as well as in his role as head of the products company within purview of the Robinson-Patman Act.

19. **Petitioners failed to adequately substantiate claim that challenged payments fell within "for services rendered" exception of the Robinson-Patman Act prohibition against illegal brokerages, and although conflicting testimony was presented, there was sufficient evidence from which FTC could find a violation of the Act.**

Although conflicting testimony was presented, there was substantial evidence from which Federal Trade Commission could find violation of Robinson-Patman Act section prohibiting illegal brokerages and payments were not exempt as falling within the "for services rendered" exception since petitioners failed to provide adequate evidence to substantiate that claim.

20. **Finding that retail discount store founder's sons violated the Robinson-Patman Act was supported by substantial evidence.**

There was substantial evidence to support finding of violation of the Robinson-Patman Act by retail discount store founder's sons.

21. **Where remedy is reasonably related to violation, use of broad order within context of interwoven corporate entities is within FTC discretion.**

Use of broad order within context of interwoven corporate entities is within Federal Trade Commission's discretion where remedy is reasonably related to violation.

22. **FTC order enjoining family members and corporations from further violations of the Robinson-Patman Act was reasonably related to remedies sought, where trade show and franchising aspects overlapped and where significant interrelationship existed among family members and corporations.**

Where there was substantial interrelationship among family members and corporations and where trade show and franchising aspects overlapped, Federal Trade Commission order, by enjoining family members and corporation was reasonably related to remedies sought, that is, to restrain further violations of the Robinson-Patman Act and to block possible group boycotts of type found in the instant case.

23. **In determining whether public interest requires an order, FTC has broad discretion.**

Federal Trade Commission has broad discretion in determining whether public interest requires an order.

24. **Although broad, FTC order was reasonably related to statutory violations found.**

Federal Trade Commission order, while broad, was reasonably related to practices found to be in violation of the Federal Trade Commission Act and the Robinson-Patman Act.

Petitions were filed to review final order of the Federal Trade Commission. The Court of Appeals, Brown, Circuit Judge, held that: (1) petitioners waived objection to participation of administrative law judge who had previously served as attorney advisor to the FTC Commissioner; (2) there was substantial evidence to support finding of group boycott; (3) there was sufficient evidence to support finding of violation of the Robinson-Patman Act; and (4) FTC order was not overly broad.
Affirmed and enforced.

(*Syllabus, with substituted captions, taken from 682 F.2d 554*)

Robert B. Bain, Dallas, Tex., *Robert E. Rader, Jr.*, Ennis, Tex., for petitioners in No. 80-1743.

Bardwell D. Odum, Dallas, Tex., for petitioners in No. 80-1746.

Ernest Isenstadt, William A. E. Doying, F.T.C., Washington, D.C., for respondent.

Before Brown, Coleman and Rubin, *Circuit Judges.*

JOHN R. BROWN, *Circuit Judge*:

As the curtain rises, the Gibsons appear before us once more for what we hope will be the final act in this almost 15 year drama starring the Gibsons, masters of discount merchandising, and the Federal Trade Commission (FTC). Unlike the earli[557]er scenes in this Court[1], this time we are to arrive at the merits as we review the FTC's final order enjoining the Gibson Petitioners from engaging in assorted trade practices. As the curtain falls, we affirm the order and direct enforcement.[2] No encores please.

Setting the Stage

In 1958 H.R. Gibson, Sr., and his wife Belva founded the first Gibson Discount Center in Abilene, Texas. From this beginning emerged a chain of over 500 retail discount stores operating in 29 states, and several small corporations providing certain support or related services to the retail stores. The scions of the family, H.R. Gibson, Jr., and Gerald P. Gibson, were actively involved in the family business, each owning interests in several of the retail stores, and eventually receiving the ownership interest of their parents.

A Family Affair or Who's Minding the Store

The Gibson retail discount stores are generally incorporated individually and include not only family owned and operated stores but also stores licensed to use the Gibson name.[3] In the period 1969 to October 31, 1972, Gibson, Sr., in addition to licensing various franchisees to use Gibson trade names in the operation of retail stores, operated a private trade show where manufacturers displayed their products to buyers for both Gibson-owned and franchised stores. During this same period, Gibson, Sr. and his wife Belva were majority stockholders in several Gibson retail stores and held a minority interest in certain other retail stores. The store managers of the majority owned stores were hired by Gibson, Sr. who left the day-to-day operations largely to the store managers. During this same period, from 1969 to November 1, 1972, both Gibson sons owned retail stores.[4] The Gibson stores, family owned and franchised, collectively did approximately $1.6 billion in business in 1971.

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[1] In two prior cases we affirmed enforcement of FTC subpoenas, once during the investigative stage. *FTC v. Gibson*, 461 F.2d 605 (5th Cir. 1972), and once following the subsequent issuance of an FTC complaint, *FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978). While the parties in these two cases and the instant case are not absolutely identical, the actions all stem from the same FTC investigation.

[2] "To the extent that the order of the Commission is affirmed, the Court shall thereby issue its own order commanding obedience to the terms of such order of the Commission." 15 U.S.C. § 45(c).

[3] As of December 31, 1976, 43 retail stores were controlled by individual members of the Gibson family and 614 licensed stores were operated under the Gibson trade name. The licensees pay a monthly fee for the use of the Gibson trade name.

[4] Gerald Gibson owned Gibson stores in Paris, Texas, Shreveport, Louisiana and Bruton Terrace in Dallas, Texas, as well as minority interest in stores in Pueblo, Colorado, Garland, Texas and Temple, Texas. H.R. Gibson, Jr. owned the majority of stock in stores in Hutchinson, Kansas and San Antonio, Texas, as well as owning some stock in stores located in Pueblo, Colorado, and the following cities in Texas: Richardson, Temple, Bruton Road in Dallas, Plano and Fort Worth.

On November 1, 1972, the Gibson businesses were reorganized so that Gibson, Sr. and his wife Belva disposed of their ownership interest in both the franchising and retailing aspects of the family business, transferring these to their two sons, Gibson, Jr. and Gerald Gibson. Gibson, Sr. sold the Gibson Products Company name to his sons and retained only the trade show business, registered as "The Gibson Trade Show". Gibson's, Inc., wholly owned by Gibson, Jr. and Gerald Gibson, was the corporate entity used to buy Gibson, Sr.'s retail business and continues to hold the stock of the retail stores. Gibson's Discount Centers, Inc., a subsidiary of Gibson's, Inc., actually carries on the retailing and franchise business.

Franchisees of the Gibson trade name are charged a monthly franchise fee and are subject to quality control by the franchisor.[5] **[558]** Along with the use of the trade name, franchisees receive merchandising advice and most importantly are able to participate in the Gibson Trade show.

Tricks of the Trade

The Gibson Trade Show, an essential element in both the Gibson franchises and in the FTC complaint, is a private trade show produced by Gibson, Sr. The show, held approximately four times a year, is basically restricted to buyers for Gibson-owned and franchised stores. The show is the vehicle through which representatives of various suppliers can exhibit their products and attempt to obtain orders from various Gibson stores. A supplier or representative allowed booth space in the show in effect has authorization to sell his products to Gibson retailers but no guarantee that the franchisees will buy his products. Gibson, Sr. employs "merchandise managers" or "trade show buyers" to operate the show. The trade show buyers recruit manufacturers to participate in the show, discuss product lines, billing terms and prices with suppliers, and negotiate with suppliers to get the best possible deal on the products that are to be shown. These buyers basically determine what suppliers are allowed to participate in the show as well as what products can be displayed. An integral part of the trade show operation is the show sheet (an order form and price list) which is filled out by the buyer after negotiations and indicates the price and terms for each product. These sheets, which are the exclusive order form used at the shows, are headlined "Ship to Gibson Products Company," followed by blank lines for the address of a particular store. In addition, they contain a notation instructing manufacturers not to ship at prices higher than those listed or a deduction will be taken. In return for the privilege of participating in the trade show, suppliers pay for booth rental, related service fees and show fees. Show fees are generally based on a percentage of sales made at the Gibson Trade Show although some suppliers pay a flat fee. Suppliers who refused to pay show fees were generally not permitted to participate in the trade show.

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[5] The standard licensing contract of Gibson Discount Centers, Inc., the wholly owned subsidiary of Gibson's Inc., in use since November 1, 1972, provides in part:

> 9. GIBSONS shall in connection with this Agreement render such assistance to LICENSEE in connection with the operation of his discount business as may be found appropriate by GIBSONS after request by LICENSEE, including advice as to merchandising and other business practices so as to enable the LICENSEE to benefit from the knowledge and experience of GIBSONS in the discount business.
>
> 10. LICENSEE agrees that GIBSONS retains the absolute, complete and final right of quality control over all products and items sold and over all services rendered by LICENSEE to customers of LICENSEE'S discount business and associated enterprises using the Service Marks and Trade Names licensed hereby to see that the high standards of GIBSONS DISCOUNT CENTERS throughout the United States of America are maintained and to protect the property rights of GIBSONS in the Service Marks and Trade Names set forth in Paragraph 1 hereof. The LICENSEE further agrees that if GIBSONS notifies LICENSEE that GIBSONS disapproves of the quality of products, items, or services sold or rendered in connection with sale of items or products in the discount business of LICENSEE, that LICENSEE will immediately discontinue the sale of such items, products and/or services, or will immediately improve such services so that they meet the standards of excellence maintained by GIBSONS

ALJ opinion p. 27-28.

Prologue

Although the FTC made a cameo appearance as early as 1967 when it first began investigating the Gibsons, it was not until February 1975 that it obtained star billing by issuing a three-count complaint alleging violations of the Federal Trade Commission Act and the Robinson-Patman Act against several Gibson-owned corporations, Gibson, Sr., his wife, and sons, Herbert and Gerald. Count I charged the petitioners with inducing suppliers to pay promotional allowances in connection with the Gibson Trade Show which were not proportionately available to other customers of the suppliers, violating Section 5 of the FTC Act, 15 U.S.C. § 45(a). Count II, also alleging violation of Section 5, concerned the boycott of suppliers who did not grant the promotional allowances charged in Count I. This count focused on the experience of three different suppliers. **[559]** Toastmaster, Tucker Manufacturing Co., and Jeannette Glass Company. Count III alleged the payment of illegal brokerage in violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(c).[6] The focus of Count III was on brokerage paid to Gibson, Sr. by two brokers, Barshell, Inc. and Al Cohen Associates, Inc., which successively represented Ray-O-Vac in sales to the Gibson stores.[7] After extensive pretrial proceedings and a ten-month trial, the ALJ issued a 235 page opinion, accompanied by a two and one-half page order. The ALJ dismissed Count I. Under Count II, the boycott of suppliers, the ALJ issued an order against all respondents except Gibson's, Inc. Under Count III, the ALJ issued an order only against Gibson, Sr.

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[6] Section 2(c) provides:

> (c) **Payment or acceptance of commission, brokerage or other compensation.** It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

[7] Barshell, Inc., originally charged in the FTC complaint, negotiated a consent settlement in 1976. Al Cohen Associates, Inc., charged solely in Count III, was dismissed by the ALJ after trial for failure by the FTC to prove the allegations of the complaint.

Both parties appealed the ALJ's decision to the Commission. The Commission affirmed the dismissal of Count I. It extended the order as to Count II to include Gibson's, Inc., finding that the boycott continued after November 1, 1972 under the management of Gibson's, Inc. and that it was proper and necessary to include Gibson's, Inc. in the order as the successor to the operations of a corporation found to be guilty of unfair trade practices. As to Count III, the Commission extended the provisions of the order concerning illegal brokerage to all Gibson family and corporate respondents on the basis of their complete interdependence and common control during the period of the violations. The Commission's decision and accompanying order issued on April 30, 1980. The petitioners filed motions for reconsideration in mid-June 1980, challenging certain aspects of the order. In addition, the respondents argued that certain actions taken by the Commission during periods of allegedly lapsed appropriations violated the Antideficiency Act, 31 U.S.C. § 665(a), and thus required dismissal or remand of the case. The third ground for reconsideration, and the only one pursued beyond the Commission, is based on the alleged disqualification of the ALJ, von Brand, based on his earlier service as an attorney-advisor to former Commissioner MacIntyre. The petitioners alleged that in light of the opinion of the Ninth Circuit in *Grolier, Inc. v. FTC,* 615 F.2d 1215 (9th Cir. 1980), von Brand should have been disqualified from serving as an ALJ and thus dismissal or remand of the case was necessary. The Commission issued a further opinion and order denying the majority of the relief sought.

Another Opening, Another Show

In seeking to have the FTC order set aside the Gibsons raise several challenges, not only to the specific proceedings and order in their case, but to the general administrative system developed by the FTC. In addition, they contend there is insufficient evidence on both the Count II boycott charge and the Count III Robinson-Patman charge. Although the arguments in both cases, that against Gibson, Sr. and his wife and that against the Gibson sons and Gibson corporations, are, like their briefs, almost identical, the Gibson sons and corporations also maintain that there is no evidence to connect them, as opposed to Gibson, Sr., with the allegations.

For openers, the Gibsons lead with their weakest argument, contending the FTC system of prosecution-adjudication deprives **[560]** them of their right to a fair trial and due process. Specifically, the Gibsons challenge the role of the Commission in investigating, adjudicating and reviewing complaints. "The Commission not only votes the complaint, but it determines by its adjudicatory powers what constitutes 'unfair' practices under Section 5." The Gibsons also challenge the role of the FTC attorney who coordinated the investigation in the pre-complaint period and then later served as "complaint counsel". The ALJ, a former attorney-advisor to Commissioner MacIntyre, also figures in to the "can't win" system of the FTC. Continuing their attack, the Gibsons assert that they have been before the FTC for *13 years,* "awaiting this opportunity for a meaningful review by a fair and unbiased tribunal, a Court of Law." Finally, totally removed from any context, the Gibsons present a tirade against the use of consent orders in general, relying on the testimony before a Congressional subcommittee of Frederic Scherer, a Director of the Bureau of Economics of the Federal Trade Commission.

[1-3] The FTC, however, clearly holds the trump in this hand, relying first on the Commission's organic legislation providing for the Commission to issue administrative complaints and subsequently sit as an adjudicative body. Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b). The combination of investigative and judicial functions within an agency has been unheld against due process challenges, both in the context of the FTC and other agencies. *FTC v. Cinderella Career and Finishing Schools, Inc.,* 404 F.2d 1308, 1315 (D.C.Cir. 1968); *Pangburn v. CAB,* 311 F.2d 349, 356 (1st Cir. 1962); *FTC v. Cement Institute,* 333 U.S. 683, 700-03, 68 S.Ct. 793, 803-04, 92 L.Ed. 1010, 1035 (1948); *Withrow v. Larkin,* 421 U.S. 35, 51-56, 95 S.Ct. 1456, 1466-69, 43 L.Ed.2d 712, 726-28 (1975). Further, the participation of the staff attorney in both the investigation and subsequent prosecution of a case is clearly allowed under 5 U.S.C. § 554(d). Nor is there any merit to the Gibsons' contention that they were denied due process by the 13-year delay. First, although the initial decision to investigate the Gibsons occurred in 1967, the administrative complaint was not issued until 1975. Second, as the FTC points out, the delay must be credited in part to the Gibsons themselves. *See FTC v. Gibson Products of San Antonio, Inc.,* 569 F.2d 900 (5th Cir. 1978); *FTC v. Gibson,* 460 F.2d 605 (5th Cir. 1972). As to the argument that consent decrees are used for coercion, we find this point irrelevant since the Gibsons are not here seeking to be relieved of a consent order and have failed to indicate how this argument has any connection with the merits of their own case. Forcing the Gibsons to choose between consenting to an order or incurring the burdens and expenses of a defense is inherent in the adversary process and is basically "part of the social burden of living under government." *FTC v. Standard Oil Co.,* 449 U.S. 232, 244, 101 S.Ct. 488, 495, 66 L.Ed.2d 416, 427 (1980), quoting *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209, 222, 58 S.Ct. 834, 841, 82 L.Ed. 1294 (1938).

Changing Roles—From Understudy to Lead

With the FTC taking the first trick, the Gibsons next present their strongest and longest argument, that concerning the qualification of the ALJ in light of his prior service as attorney-advisor to an FTC Commissioner.

The Gibsons' chief argument as to the administrative process concerns Theodor von Brand's metamorphosis from attorney-advisor to administrative law judge. Von Brand had served previously from 1963 through January 1971 as an attorney-advisor to former Commissioner Everett MacIntyre. In February 1977, at a prehearing conference, von Brand apprised counsel for the Gibsons of his prior service with Commissioner MacIntyre. In a discussion off the record, as to which there is no real difference of view, von Brand indicated he had no recollection of anything having come across his desk while serving as an attorney-advisor concerning the Gibsons and determined that the Gibsons had no objection to his continuing to serve as the ALJ in this [561] case. Then, to avoid any future problem, von Brand specifically put the following in the record.

> Judge von Brand: All right. The first thing I want to raise is something that I have raised off the record. I have informed counsel that in the period 1963 to 1970 I was legal advisor to Commissioner MacIntyre.
>
> Now, it is my understanding that none of the respondents in this proceeding would raise an objection to my continuing in this case on that ground.
>
> Is that correct, Mr. Odom [attorney for Gibson, Sr. and Belva Gibson]?
>
> Mr. Odom: That's correct as far as I'm concerned, yes sir.
>
> * * * * * * *
>
> Mr. Raider [attorney for Gibson sons and corporations]: That's correct, Your Honor.

Subsequently, von Brand presided over the ten-month trial, during which no objection was raised concerning von Brand's qualification. On February 26, 1979, von Brand issued his initial decision and order. This decision was appealed to the Commission which issued a decision and order on April 30, 1980. Not until June 12, 1980 did the Gibsons seek von Brand's disqualification, in a petition for reconsideration of the Commission's order. The Commission, in an order of August 8, 1980, refused this relief. The basis for the Commission's decision was threefold: (1) failure by the Gibsons to file a disqualification motion and supporting affidavits as required by the Commission's rule § 3.42(g)(2), 16 C.F.R. § 3.42(g)(2); (2) failure to file a timely objection; (3) no demonstration or assertion of prejudice. In its opinion, the Commission devoted substantial attention to the Ninth Circuit opinion in *Grolier, Inc. v. FTC,* 615 F.2d 1215 (9th Cir. 1980), discussed in more detail below.

The Gibsons' primary argument is that Section 5 of the Administrative Procedure Act (APA), 5 U.S.C. § 554(d),[8] by prohibiting an "employee or agent" from performing "investigative or prosecuting functions" and also participating or advising in the decision, places on the adjudicative process limitations which are essentially jurisdictional, and in addition, cannot be waived. The Gibsons contend that an attorney-advisor, as opposed to a Commissioner, is not exempt from the disqualification by 5 U.S.C. § 554(d)(2)(C). To the Gibsons, the basic concern of § 554(d) is the public interest in fairness, an interest that may not be waived. The Gibsons assert that their right to insist upon the disqualification of von Brand is "secondary to the public interest." Finally, in response to any criticism of the Gibsons' delay in raising this issue, they maintain that the right of disqualification was not apparent until the Ninth Circuit decision in *Grolier, supra.*

Taking a Cue from the Ninth

The *Grolier* case, so heavily relied upon by the Gibsons, actually involved the same **[562]** ALJ. ALJ von Brand had served as an attorney-advisor to Commissioner MacIntyre during the period when Grolier was intermittently investigated and charged by the FTC. Records indicated that Commissioner MacIntyre had attended at least one meeting between Grolier and the representatives of the FTC. Grolier, upon learning of ALJ von Brand's prior service to Commissioner MacIntyre, requested that the ALJ disqualify himself from further participation in the proceedings. Von Brand denied the request, stating that he did not recall working on matters involving Grolier while serving as a legal advisor. Grolier then filed a formal motion for disqualification and removal of the ALJ with the FTC and requested that the FTC permit discovery of certain FTC records which might reveal the nature and extent of the ALJ's contact with the Grolier case. Both the requested discovery and the motion for disqualification were denied by the FTC. In its petition for review in the Ninth Circuit, Grolier argued that the failure to disqualify ALJ von Brand violated both § 554(d) of the APA and the Due Process guarantee of the Fifth Amendment. Grolier also alleged error by the FTC in denying the requested discovery.

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[8] Section 554(d) provides:

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title [5 USCS § 556] shall make the recommended decision or initial decision required by section 557 of this title [5 USCS § 557], unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title [5 USCS § 557], except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) *to the agency or a member or members of the body comprising the agency.*

(emphasis added).

The Ninth Circuit, in an opinion issued January 24, 1980 as amended on denial of rehearing April 17, 1980, determined that the exemption under 5 U.S.C. § 554(d)(2)(C) did not apply to ALJ von Brand once he was no longer an attorney-advisor. The Court specifically rejected the *per se* disqualification argument of Grolier that the ALJ was chargeable with knowledge of all investigative and prosecutorial activities undertaken by the FTC during his tenure as an attorney-advisor. In adopting a test focusing on the activity of the ALJ at the time that he served as an attorney-advisor, the Ninth Circuit indicated that disqualification was necessary only if the ALJ "was sufficiently involved with the case to be apprised of *ex parte* information, . . ." *Grolier,* 615 F.2d at 1221. The Court also placed the burden of showing the ALJ's prior acquaintance with *ex parte* information on Grolier, the party challenging the qualification of the ALJ. After determining that the FTC wrongly concluded that attorney-advisors do not perform "investigative or prosecuting functions" within the meaning of § 554(d), the Ninth Circuit remanded the case to the FTC for reconsideration of the denial of discovery and in light of the results of that reconsideration, the disqualification motion. The Court very clearly indicated that the FTC did not necessarily have to grant discovery but it could not simply rely on a flat refusal to disclose anything concerning von Brand's involvement. The Court suggested that the FTC might initially respond through affidavits concerning the extent of von Brand's involvement with the *Grolier* case while he served as attorney-advisor.[9]

The FTC's primary argument is that the Gibsons expressly waived the claim for disqualification during the pretrial proceedings and did not timely renew any claim. In addition, the FTC distinguishes the *Grolier* case on the facts. In *Grolier* there was no express waiver of von Brand's continuing to preside. Grolier specifically objected to the ALJ's participation and filed a motion to disqualify the ALJ prior to the Commission's decision. Nor does the FTC believe that the statutory separation of functions requirement cannot be waived. Rather, the FTC contends that the Gibsons' decision not to raise the issue of the ALJ's disqualification in its appeal to the Commission or prior to the issuance of the Commission's opinion was a calculated litigation decision, one which paid off in part since von Brand in his initial decision dismissed the principal charge in the complaint. The rationale supporting the waiver of this technical procedural requirement is analogous to the rule imposed on litigants that **[563]** points of error will not be considered for the first time on appeal unless manifest injustice will result. To the FTC there is nothing unfair in holding a party to an express, knowing waiver.

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[9] The Ninth Circuit specifically did not reach the due process claim of Grolier, indicating that if von Brand is qualified, a more adequate record might be developed for the Court's determination of the due process claim.

Upon remand, the Commision denied the motion to disqualify von Brand and subsequently reissued its final order with modifications on March 9, 1982.

Prior to the Ninth Circuit opinion in *Grolier*, the FTC took the position that § 554(d) did not apply to former attorney-advisors since they did not perform investigative or prosecutorial functions within the meaning of that section. In reaching such an outcome, the FTC focused upon the Congressional desire to prevent adjudication by those who had developed a "will to win." *In re Grolier, Inc.*, 87 F.T.C. 179 (1976). In reversing the FTC decision, the Ninth Circuit found an "equally important Congrerssional desire to prevent adjudicative interpretation of *ex parte* facts." *Grolier,* 615 F.2d at 1220 n.5. The Ninth Circuit, while rejecting the FTC position that § 554(d) was not applicable to the situation, specifically refused to accept the position here urged by the Gibsons that the ALJ was chargeable with knowledge of all investigative and prosecutorial activities undertaken by the FTC during his tenure as an attorney-advisor. *Grolier,* 615 F.2d at 1221. It is obvious from the decision that the Ninth Circuit did not view the situation as fundamentally unfair or jurisdictionally void since it refused a *per se* disqualification rule, choosing rather to remand the case to determine whether Grolier could meet the burden of showing that von Brand had prior acquaintance with *ex parte* information. Thus the Ninth Circuit opinion in no way forecloses the possibility of waiver, a concept wholly compatible with placing the burden of establishing prior knowledge on the proponent. Without rejecting the opinion of the Ninth Circuit in *Grolier,* there is a clear distinction. In the *Grolier* case, Grolier clearly and vigorously raised the issue of von Brand's participation in a timely manner, both before the ALJ and the FTC. This is a far cry from the Gibsons' express waiver of any objection to von Brand's continuation in the case after the ALJ's candid revelation of the facts.

The Waive of the Past

[4] We may agree, without deciding, that § 554(d) applies to the situation of an attorney-advisor who subsequently serves as an ALJ. We do this because we hold that the Gibsons—with explicit awareness of the facts or at least of the facts indicating the necessity for further factual inquiry open to them under FTC rules—expressly waived any objection they might have. Not only did the Gibsons clearly indicate that they had no objection to von Brand continuing to preside in their case, they failed to raise at any meaningful point or in any meaningful way the issue of disqualification. Subsequent to the ALJ's opinion, the Gibsons in their appeal to the Commission did not mention the issue of disqualification. Nor did they mention it at oral argument on the appeal or once the case was under advisement by the Commission. Even after the Ninth Circuit issued its opinion in *Grolier,* the Gibsons failed to direct the Commission's attention to this case or to raise this issue. Only after the Commission had issued its decision, one less favorable to the Gibsons than that of the ALJ, did the Gibsons indicate

any objection to the ALJ's participation. If the Gibsons objected to von Brand's participation, at the minimum they should have preserved this objection three years earlier when they were asked specifically by the ALJ if they objected to his continued participation.

[5] Nor can we accept the Gibsons' argument that they were under no duty to raise the issue since the FTC had indicated in its *Grolier* decision that disqualification was not necessary. Because the Gibsons expressly waived any objection, they are in no position to argue that a challenge to the ALJ's participation would have been fruitless. A party in an administrative proceeding, as in litigation in a court, has the duty and responsibility to bring to the attention of the agency an objection so that the agency has the opportunity to reconsider its position. This is no different than our requirement that a party provide the lower court with the opportunity to correct its errors by pointing out those errors to the **[564]** District Judge first. It is certainly conceivable that von Brand would have recused himself in the case which had not yet gotten under way or that the FTC, if presented with other arguments, might have reconsidered its position in *Grolier*.

Nor are we convinced by the Gibsons' argument that they were afraid to raise the issue of von Brand's participation for fear of antagonizing the ALJ. Counsel for Gibson, Sr. would have us believe that his reticence was based on his personal familiarity with the *Grolier* case, hearings on which were also being held in the Dallas FTC offices at the same time. We are not persuaded. Counsel for Grolier obviously harbored no such fear, filing timely an objection to von Brand's participation. Even if we were to acquiesce in the excuse for failing to raise the issue before von Brand, this argument offers no succor for the Gibsons' failure to raise the issue subsequently before the Commission. Certainly the Gibsons did not hesitate to contest the ALJ's opinion in other aspects, objections which called into question prior opinions of the FTC in other areas. Rather we are presented with a situation where, due to the fortuitous intervening decision of the Ninth Circuit in *Grolier*, the Gibsons are now able to advance, retrospectively, an argument for disqualification of the ALJ. They are, however, unable to convince us of the applicability of *Grolier* to an express waiver of the kind involved here. The attempted end run around the need for timely objection through the argument of a situation analogous to exhaustion of remedies provides no yardage. While the Gibsons rely on *Board of Education v. Harris,* 622 F.2d 599 (2d Cir. 1979), *cert. denied sub nom., Hufstedler v. Board of Education,* 449 U.S. 1124, 101 S.Ct. 940, 67 L.Ed.2d 110 (1981), that case specifically distinguishes the issue of exhaustion from waiver of objection.

Case law supports the concept of timely objection with its complementary notion of waiver within the context of disqualification under § 554(d). In *International Paper Co. v. Federal Power Commission,* 438 F.2d 1349 (2d Cir.), *cert. denied,* 404 U.S. 827, 92 S.Ct. 61, 30 L.Ed.2d 56 (1971), the Second Circuit, in considering alleged violations of due process and § 554(d) based on the participation of the general counsel and other FPC employees in both prosecutorial and decision making functions, found a waiver from the failure of a party to object timely.

> Appellant made no timely challenge to this purported practice nor did counsel call it to the attention of the Commission at the time the stipulation of facts agreed to had been reviewed and approved by the Assistant General Counsel and General Counsel, before the supposed error was committed. This knowing inaction and calculated lying in wait, taken with the hope of upsetting a future adverse decision of the Commission, constituted a waiver of appellants rights.

438 F.2d at 1357. The D.C. Circuit in *Democrat Printing Co. v. FCC,* 202 F.2d 298 (D.C.Cir. 1952) also found a waiver from the failure to raise a timely objection.

Aside from these specific interpretations of § 554(d), the requirement for filing of a timely objection finds support in the language of § 556(b) of the APA which provides: "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case." The Ninth Circuit, in considering a motion of disqualification based on bias on the part of a Commissioner, in *Safeway Stores, Inc. v. FTC,* 366 F.2d 795, 802 (9th Cir. 1966), *cert. denied,* 386 U.S. 932, 87 S.Ct. 954, 17 L.Ed.2d 805 (1967), found that a motion was not timely where the objecting party had been silent during trial, briefing, and argument to the Commission and had only raised the argument several months after the Commission issued an unfavorable decision. In *Marcus v. Director, Office of Workers' Compensation Programs,* 548 F.2d 1044, 1050-51 (D.C.Cir. 1976), the D.C. Circuit, while indicating that disqualification under § 554(d) is mandatory, also stated:

> The general rule governing disqualification, normally applicable to the federal **[565]** judiciary and administrative agencies alike, requires that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process. The APA-mandated procedures afford every party ample opportunity to enforce and preserve its due process rights.

548 F.2d at 1051 (footnotes omitted). *See also Capitol Transportation, Inc. v. United States,* 612 F.2d 1312, 1325 (1st Cir. 1979) (claim of bias on part of ALJ first raised on petition for reconsideration after final order of agency).

The Commission, in denying the Gibsons' motion for reconsideration, indicated that disqualification claims must be raised as soon as practicable and cited several cases in support. In addition, the Commission relied on its Rule of Practice § 3.42(g)(2) governing the filing of disqualification motions.[10] The motion and supporting affidavits must set forth the grounds for disqualification. The ALJ has ten days within which to disqualify himself. Should he not do so, he must certify the motion to the Commission which must determine promptly the validity of the claim. As the Commission indicated in its denial of the Gibsons' motion for reconsideration:

> The requirement of affidavits [under Rules of Practice § 3.42(g)], grounded in 5 U.S.C. § 556 (1976), is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding. There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place; a disqualification motion must not be made by a party, nor taken by the Commission, lightly. . . . Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. Respondents' failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect.

[6] This Court has implied a timeliness requirement within the context of disqualification claims in an analogous situation, that concerning judicial disqualification under 28 U.S.C. § 455.[11] In *Delesdernier v.* **[566]** *Porterie*, 666 F.2d 116 (5th Cir. 1982), we found that a motion to disqualify raised for the first time on appeal after two full trials on the merits was too tardy to consider. Looking to the policies underlying the disqualification of judges statute, we stated:

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[10] Rule of Practice § 3.42(g)(2) as in effect at the time provides:

(g) *Disqualification of administrative law judges.*

* * * * * * *

(2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law Judge does not disqualify himself within ten (10) days, he shall certify the motion to the Commission, together with any statement he may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose.

[11] Section 455 provides:

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding, in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

> If disqualification may be raised at any time, a lawyer is then encouraged to delay making a § 455(a) motion as long as possible if he believes that there is any chance that he will win at trial. If he loses, he can always claim the judge was disqualified and get a new trial. This result would not comport well with the purposes behind § 455(a). . . . Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of ensuring judicial fairness into a mere litigation stratagem.

666 F.2d at 121, *See also In re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980); *Marcus, supra*, and cases cited therein at n.21; *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (4th Cir. 1974). The same policies supporting timely objection or motions to disqualify judges are equally applicable to administrative law judges. A party should not be able to manipulate the rules by the use of an express waiver only to attempt later to avoid the effects of this waiver. Granted, as the Gibsons assert, "[w]hat is at stake here is not so much the right of an individual FTC Respondent . . . but the public interest, the confidence of the public in the fairness of the adjudicative system of the FTC, and the entire administrative action of the FTC," we must emphasize that the public has an interest as well in conserving judicial and quasi-judicial resources and in ensuring the integrity of adjudicative process. Allowing a party to waive expressly an objection and then later seek to avoid it undermines the integrity and finality of administrative procedures.

[7] Finally, there is simply no indication of any manifest injustice or prejudice to the Gibsons from the participation of ALJ von Brand. The Commission, in denying the Gibsons' motion for reconsideration, also indicated that the Gibsons had not demonstrated or even asserted any prejudice, stating:

> [O]ur review of the record convinces us that Judge von Brand was impartial in every respect, that his decision was thoroughly researched, and that his meticulous findings and conclusions were firmly and exclusively based on the record evidence. Of course, to the extent respondents challenged Judge von Brand's findings, conclusions, and proposed order, we undertook an exhaustive, independent review. In that review, we did not find that issues of demeanor or discretion were especially important in the determination of the case; thus, even if it were to be determined that Judge von Brand was disqualified, our decision of April 30, 1980 would not be void, as respondents have neither demonstrated nor suggested actual prejudice from his presiding, and we perceive none.

The lack of prejudice seems clear from the fact that the transactions forming the basis for liability challenged here occurred after 1971 when von Brand left the service of Commissioner MacIntyre. The only charge that could possibly rely on ex parte information that in Count I, was dismissed by the ALJ. Nor have the Gibsons provided or even suggested the existence of any evi**[567]**dence that von Brand either possessed or relied on ex parte information. Unlike *Grolier*, the Gibsons did not even request discovery of what information ALJ von Brand would have had available to him, choosing instead to rely on the unsupported position that "It is accepted that the attorney-advisor . . . is fully chargeable with whatever knowledge the Commissioner . . . had of the Gibson pre-complaint matters before the Commission." The only support for this position is a quote from former FTC Chairman Engman in which he states: "I generally would charge an attorney-advisor with the same insider knowledge chargeable to his Commissioner." Even the Ninth Circuit in *Grolier* would not adopt such a broad position.

A Sufficient Toast

Act II opens with the Gibsons contending that there is insufficient evidence to support Count II, that of the boycott. Specifically, the Gibsons assert that there was no evidence to connect the Gibson sons and companies with the invitation to boycott letter, and no proof that a boycott actually existed. The Commission's finding that the Gibsons engaged in a group boycott, a per se violation of the antitrust laws, relies on the evidence of three companies who refused to meet the price terms demanded for participation in the Gibson Trade Show, the Toastmaster Division of McGraw Edison Co. (Toastmaster), Tucker Manufacturing Co., and Jeannette Glass Co.

Toastmaster participated in the Gibson Trade Show from 1966 to 1970. At a meeting on June 22, 1970, Toastmaster's representative was asked for a payment of three percent of its sales volume to Gibson stores, which the representative refused. Toastmaster was informed that it was not "cooperating" and as a result of this lack of cooperation, it was unable to exhibit at the Gibson Trade Show from August 1970 through 1973. On January 22, 1971, the following letter on Gibson Products Company stationery was addressed to "All Stores" concerning Toastmaster.

> The above company will not sell to us at a price we would recommend as being profitable and beneficial for your operation. We, therefore, no longer recommend or authorize this line, and suggest that you discontinue the same.
>
> Please give this your attention, and we appreciate your continued cooperation.

Although Toastmaster continued its attempts to sell to the Gibson stores, sales volume dropped sharply, from over $950,000 in 1970 to $297,000 in 1971. Toastmaster representatives were told on at least two occasions by franchised stores that they were declining to buy from Toastmaster because of the "All Stores" letter. In 1974, Toastmaster agreed to the terms for participation imposed by Gibson, Sr. and once again participated in the trade show. At this point, Toastmasters' sales to the Gibson stores increased.

Tucker and Jeannette had similar experiences. When negotiating for an exhibit at the February 1971 Trade Show, Tucker's representative refused to pay a two percent volume rebate and was excluded from the Trade Show. On March 11, 1971, a substantially identical "All Stores" letter was sent by Gibson Products Company concerning Tucker. When Tucker representatives subsequently agreed to pay the rebate, the company was readmitted to the August 1971 Gibson Trade Show. Jeannette, directly and through its brokers, was asked for a five percent rebate, to be paid to Gibson, Sr. and not to individual stores. After it refused to make such a rebate, an "All Stores" letter was sent on March 30, 1971. Jeannette was refused readmittance to the shows without the five percent payment and was unsuccessful in attempting to sell to the family-owned stores, though it was able to make some sales to franchised stores.

The ALJ found the Gibsons liable on the Count II boycott charge. The Commission amended the ALJ's order to include Gibson's, Inc., finding that the boycott continued after the November 1, 1972 change in management.

The Gibsons contend that there was no boycott and that the Commission failed to **[568]** prove that the All Stores letter caused the decline in Toastmaster sales. The Gibsons offered several justifications for the All Stores letter in the Toastmaster case, including Toastmaster shipping policies during the Christmas season and dissatisfaction with the Toastmaster warranty program.

No R.S.V.P. Necessary

[8, 9] The All Stores letter concerning Toastmaster is, at the minimum, an invitation to boycott, specifically requesting that the stores refrain from dealing with Toastmaster. The letter is certainly stronger than that found sufficient in *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914). Nor is it necessary for a group boycott that there be an express mutual agreement to refuse to deal. The contemplation and invitation for concerted action along with acquiescence is sufficient. From the evidence presented, the Commission found that a substantial number of stores had acquiesced in the request by Gibson Products Company. Although some of this evidence was in the form of hearsay testimony, the Commission Rules of Practice permit the introduction of hearsay evidence, provided that it meets the standards of materiality, reliability and relevance. *See* 16 C.F.R. § 3.43(b); *Resort Car Rental System, Inc. v. FTC,* 518 F.2d 962, 963 (9th Cir.), *cert. denied,* 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). The evidence that Toastmaster representatives were told by Gibson franchisees that there was a boycott, along with the actual letter and the substantial drop in sales by Toastmaster to the Gibson stores, amply support the Commission's finding of a group boycott.

Nor was the Commission bound to accept the Gibsons' alternate explanations for the drop in sales: dissatisfaction with Toastmaster products, preference of Toastmaster's sales representatives to sell to distributors instead of directly to retailers, and Toastmaster's lack of access to Gibson retailers, because of its non-participation in the Gibson Trade Show. The evidence concerning dissatisfaction with Toastmaster's warranty program related to the mid-sixties, several years prior to the boycott. The contention that Toastmaster preferred to sell to distributors is undercut by the testimony of Toastmaster's representative that he continued his attempts to sell to individual Gibson stores even after the boycott began. As to the explanation that the drop in sales was due to non-participation in the GibsonTrade Show, this is merely a "which came first, the chicken or the egg" argument. The only reason Toastmaster did not participate in the Trade Show was its refusal to pay the requested rebate. The Commission's determination that the Gibsons failed to establish a legitimate business reason for the drop in Toastmaster's sales is also supported by the existence of two other All Stores letters, those concerning Jeannette and Tucker, which utilize substantially identical language. Each of the three suppliers refused at some point to pay the required rebate for participation in the Trade Show; each of the three letters is identical in purpose and effect.

[10] The Gibson sons and companies also contend that there is no evidence to connect them with the invitation to boycott. The All Stores letters, written on Gibson Products Co. stationery clearly connect the Gibson sons with the action since Gibson, Jr. was president of that company and Gerald Gibson was executive vice-president. Given the overlapping ownership of the corporations and the essential purpose of the Gibson Trade Show to service Gibson stores, there was sufficient evidence that an order including all petitioners was necessary for effective relief. In addition, the Commission in amending the ALJ's order to include Gibson's, Inc., determined that the boycott continued under the management of Gibson's, Inc., a corporation wholly owned by the Gibson sons and used to buy Gibson, Sr.'s retail business.

[11-14] The findings of the Commission must be accepted if there is substantial evidence on the record considered as a whole to support them. *FTC v. Standard Education Society,* 302 U.S. 112, 117, 58 S.Ct. 113, 115, 82 L.Ed. 141, 145 (1937); **[569]** *FTC v. Algoma Lumber Co.,* 291 U.S. 67, 73, 54 S.Ct. 315, 318, 78 L.Ed. 655, 660 (1934). Where there is the possibility of drawing two inconsistent inferences from the evidence, the Commission may make the choice. *Corn Products Refining Co. v. FTC,* 324 U.S. 726, 65 S.Ct. 971, 89 L.Ed. 1338 (1945). In this case, the Commission, based on the All Stores letter and the testimony of Toastmaster's agent, drew the inference that the substantial decline in Toastmaster's sale was as a result of the boycott, a determination which is supported by substantial evidence. The Commission's findings that the boycott of Toastmaster continued until at least 1974 is also supported by substantial evidence. From this finding, the Commission determined that the "institutional management" of

the boycott, at least in the post-November 1, 1972 period was in the hand of Gibson's, Inc. There is also substantial evidence to support the Commission's determination that there was substantial commonality of interest prior to November 1, 1972 and that the operations of the Gibsons were sufficiently integrated to require an order covering all petitioners. The Commission, as discussed below, has wide discretion in determining the type of order necessary to remedy unfair practices.

Assault and Batteries on the FTC Order

In Act III, the Gibsons challenge the finding of the Commission of the payment of illegal brokerage in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). Count III, the § 2(c) charge, concerns the receipt of brokerage fees by Gibson, Sr., from two brokers representing the Ray-O-Vac Division of ESB, Incorporated (Ray-O-Vac), Barshell, Inc. and Al Cohen and Associates, Inc. The FTC tried the charge on the theory that Gibson, Sr. acted as a principal or buyer who split brokerage fees.

The Miller Tale

Jim Miller was a broker employed by Ray-O-Vac to represent its products to the Gibson stores for approximately five years, from 1969 to January 1, 1974. Miller also owned all of the stock in Barshell, Inc., a distributor of health and beauty aid products, redistributing such products to various retailers and wholesalers throughout the southwest. Beginning in 1971, Barshell became the sales representative of Ray-O-Vac, representing Ray-O-Vac to the Gibson stores. In this capacity, Barshell was to present Ray-O-Vac sales promotions to Gibson headquarters, conduct necessary negotiations, and have Ray-O-Vac's products listed. In return for these services, Barshell received a 10% brokerage fee. At the time that Barshell sold to the Gibson accounts, about 80% of Barshell's sales were to the Gibson stores. Ray-O-Vac sent commission statements to Barshell recording all of Ray-O-Vac's shipments to the individual Gibson stores and the commission which Barshell had earned on these sales. Miller testified that Gibson, Sr. frequently checked Barshell's commission statements, after which Barshell made payments to Gibson, Sr., termed promotional allowances, on the basis of the sales recorded in the commission statements. A Barshell check in the amount of $13,173.43, dated September 23, 1972, was introduced into evidence and Miller testified that this was a promotional allowance. The ALJ found that the check was a transmittal of brokerage fees by Barshell received from Ray-O-Vac, to Gibson, Sr., when Gibson, Sr. was owner and operator of various retail stores and thus a buyer from Ray-O-Vac.

Al Cohen and Associates, Inc. acquired the Ray-O-Vac account effective January 1, 1974 to represent Ray-O-Vac to the Gibson stores. Al Cohen was also paid a 10% commission. In an oral agreement, Gibson, Sr. was to increase the sales volume of Ray-O-Vac and Cohen was to pay Gibson, Sr. 90% of the 10% commission. Cohen made monthly payments beginning in 1974 to Gibson, Sr., which payments continued until at least March 1978. The ALJ, finding that Gibson, Sr. was not a "buyer" at the time of the commission splitting with Al Cohen Associates, dismissed the complaint against Cohen. **[570]**

The ALJ, while finding a violation of Section 2(c) by Gibson, Sr. as to Barshell, specifically found that the allegations against the Gibson sons had not been sustained and that the FTC had failed to tie the sons into the receipt of illegal brokerage. Apparently the FTC had intended to show stock ownership by Gibson, Sr., subsequently given to the Gibson sons, in another of Miller's companies. On this basis, the ALJ dismissed the Count III allegations as to the Gibson sons. The Commission, while upholding the Section 2(c) violation against Gibson, Sr., did not address the FTC's position that all of the Gibson respondents were a "single economic enterprise." Rather, the Commission found that given the interdependence of the Gibson companies, for purposes of relief, there was ample justification to bind all Gibson corporate respondents and family members. The Commission specifically stated that they did not reverse the finding of the ALJ as to the failure by the FTC to tie the Gibson sons into the receipt of illegal brokerage. Rather the Gibson sons were placed under order for "fencing in" purposes.

[15] Ever ready to attack the FTC's order, the Gibsons challenge the Section 2(c) violation on several grounds. First, the Gibsons assert that the jurisdictional requirement of "sales in commerce" has not been met. The brokerage payments were allowances upon all Ray-O-Vac sales to Gibson retail stores, both family-owned and franchised, in a 20 state area. Thus the underlying sales were not merely connected with, but directly in, interstate commerce.

Going for Broch

[16, 17] The Gibsons' second jurisdictional argument is that there was no showing of a discrimination in price. For support, the Gibsons rely on *FTC v. Henry Broch & Co.,* 363 U.S. 166, 80 S.Ct. 1158, 4 L.Ed.2d 1124 (1960). First, Section 2(c) on its face absolutely prohibits the payment of brokerage except for services rendered and contains no requirement that a price discrimination occur. Second, *Broch* concerned variable brokerage fees charged for the purpose of creating discriminatory price advantages, rather than the situation here of a broker splitting part of his commission with the buyer. In fact, in *Broch,* the Supreme Court, in reviewing the legislative history of Section 2(c) stated:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services.

> The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.

363 U.S. at 169, 80 S.Ct. at 1160, 4 L.Ed.2d at 1128 (footnote omitted). We agree with the Commission that Section 2(c), in light of the language and purpose, requires no price discrimination in a situation of dummy brokerage such as is involved here.

[18] The Gibsons also argue that there is no evidence that Gibson, Sr. was connected with buying so as to meet the statutory requirement of a "buyer". We find this argument without merit since the ALJ and the Commission found that, at least as to the check in September 1972, Gibson, Sr. was a buyer within the context of his personal ownership and operation of individual retail stores, as well as in his role as head of Gibson Products Company.

Beauty Is Only Skin Deep

[19] Next the Gibsons maintain that there is no proof to support the Section 2(c) violation. Gibson, Sr. contends that the check issued on September 23, 1972 from Barshell, rather than being illegal brokerage, was an unrelated 3% commission due Gibson, Sr. for sales by the Gibson Trade Show of beauty and health products belonging to Barshell. Miller, Barshell's sole stockholder, identified the check in question as a payment of brokerage fees and also testified that Gibson, Sr. would periodically review Barshell's commission statement to assess a charge as his fee upon this commission. Lynn Lowe, a trade show buyer for Gibson, Sr., provided contrary testimony in**[571]**dicating that the check was in payment for the trade show's sales of Barshell's health and beauty aids. The ALJ and the Commission found Lowe's argument would not wash. There was evidence that Miller sold his health and beauty aids not through Barshell, but through his other corporation, Progressive Brokerage. In fact, Miller testified that Barshell was formed specifically to be a housewares distributor and for that reason the Ray-O-Vac account moved through Barshell. The ALJ and the Commission were entitled to draw the inference that had the payments been for the purpose described by Lowe the check would have been made out by Progressive Brokerage, rather than Barshell. Although conflicting testimony was presented, there was substantial evidence from which the Commission could find a violation of Section 2(c). Our task is not to reweigh the evidence but only to determine whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Steadman v. SEC,* 450 U.S. 91, 99, 101 S.Ct. 999, 1006, 67 L.Ed.2d 69, 77 (1981), quoting *Consolo v. FMC,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131, 140 (1966).

The Gibsons also claim that the payments in questions here are exempt from Section 2(c), falling within the "for services rendered" exception. We need not here decide whether this exception applies to payments made to a buyer because the Commission found, and we agreed, that the Gibsons failed to provide adequate evidence to substantiate this claim. The Gibsons would have us believe that since they introduced evidence of Gibson, Sr.'s services in selling products of Barshell and since Barshell compensated Gibson, Sr. by check and never asked for a refund, "the presumption then is that the services were reasonably worth the amount paid." This argument, however, fails to consider that the ALJ and the Commission found that the check in question had nothing to do with Gibson's services but rather was a payment for brokerage.

[20] The Gibsons' final contention is that there is no evidence to connect Belva Gibson or the Gibson sons with the Section 2(c) violation. The brokerage payments from Barshell to Gibson, Sr. were based on Ray-O-Vac sales to Gibson retail stores at a time when Gibson Products Company was wholly owned by the Gibsons. As the Commission stated:

> The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief, in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented.

Don't Fence Me In

In this final act the Gibsons challenged the FTC order as overly broad. This argument also includes the assertions of lack of evidence to connect the Gibson sons and corporations with the boycott and Section 2(c) violations. They contend that the evidence used pertains only to Gibson, Sr. and that including the other petitioners is merely "guilt by association". The Gibsons also attack the order as arbitrary and overly broad by requiring notice to the FTC of change in employment for a ten year period and prior notification to the FTC of corporate acquisitions, reorganizations, etc.

[21, 22] The Commission clearly found that a broad order was necessary for effective enforcement in light of the interrelationship among the Gibson family members and corporations. "At least since November 1, 1972, there has been an enhanced potential for Gibson, Sr. to act as agent or intermediary for retail stores owned by other members of the Gibson family. Indeed, he owns no stores outright at this time, meaning that, leaving aside the possibility **[572]** of treating all respondents as a 'single enterprise,' an order limited to Gibson, Sr. as a buyer might have little practical effect." The Commission has wide discretion in determining what type of order is necessary to remedy the unfair practices found. *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 611, 66 S.Ct. 758, 760, 90 L.Ed. 888, 892 (1946); *FTC v. National Lead Co.,* 352 U.S. 419, 428-29, 77 S.Ct. 502, 508-09, 1 L.Ed.2d

438, 444-45 (1957); *Alterman Foods, Inc. v. FTC,* 497 F.2d 993, 1001 (5th Cir. 1974). "[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *National Lead,* 352 U.S. at 428, 77 S.Ct. at 508, 1 L.Ed.2d at 444. The use of a broad order within the context of interwoven corporate entities is within the Commission's discretion where the remedy is reasonably related to the violation. *See Sunshine Art Studies, Inc. v. FTC,* 481 F.2d 1171 (1st Cir. 1973); *Delaware Watch Co. v. FTC,* 332 F.2d 745 (2d Cir. 1964). In this case where there is a substantial interrelationship among the Gibson family members and corporations, and where the trade show and franchising aspects overlap, the FTC order, by enjoining the Gibson sons, Belva, and the corporations as well as Gibson, Sr., is reasonably related to the remedies sought, that is to restrain further violations of Section 2(c) and to block possible group boycotts of the type here found.

Pro Bono Publico

[23, 24] The Gibsons' swan song is that the order is not in the public interest. The chorus appears to rely on the contentions that the FTC failed to prove injury to competition or the existence of a "continuing practice". First, the violations at issue here are *per se* and thus do not call for extensive analysis of anticompetitive effect. The Commission has broad discretion in determining whether the public interest requires an order. *Cotherman v. FTC,* 417 F.2d 587, 594-95 (5th Cir. 1969). Nor have the Gibsons demonstrated that there is no risk of repeated violations. The Commission specifically responded to the argument that no order was necessary since the practices were isolated.

> Respondents cannot and do not contend that the law violations were inadvertent or that these practices were voluntarily abandoned, even after issuance of the complaint. Given the nature and structure of their business operation, which remains essentially unchanged, and given the absence of any evidence of abandonment, we find that an order is necessary to combat a cognizable danger of recurrence of the violations.

We find that the order, while broad, is reasonably related to the practices, found to be in violation of the FTC Act and Robinson-Patman Act and that the FTC could conclude that these provisions are necessary to prevent future violations within the context of the interrelated corporate and family respondents. We bring down the curtain on this 15-year proceeding by ordering that the Commission's order be enforced.

AFFIRMED AND ENFORCED.

UNITED STATES
v.
UNION CIRCULATION CO., INC. and CHARLES E. REINHARDT*

Civ. A. No. C81-997A FTC File No. 812 3160

United States District Court, Northern District of Georgia
August 20, 1982

Court granted government's motion for partial summary judgment and found that a magazine subscription sales company violated FTC's TRR concerning a Cooling-Off Period for Door-to-Door Sales by failing to provide customers with proper notice of their cancellation rights and failing to make requested refunds in a timely fashion. In rejecting defendants' contentions that government's application of the Cooling-Off Rule and civil penalty provisions of the FTC Act to violative sales practices is an unconstitutional retrospective, or *ex post facto* law, Court noted that the alleged violations occurred more than two years after the Rule was enacted. While bulk of the rule was promulgated prior to enactment of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Court found company was still liable for civil penalties, since that Act contains a "savings clause" imposing civil liability for violation of any Commission rule regardless of the date of enactment.

ORDER

HALL, *District Judge*: The instant case is before this court on the plaintiff's motion for partial summary judgment and the defendants' motion for summary judgment. The defendants, Union Circulation Co., Inc. and its president Charles E. Reinhardt, are charged with violating the Federal Trade Commission's Trade Regulation Rule concerning a Cooling-Off Period for Door-to-Door Sales ("Cooling-Off Rule") (16 C.F.R. 429.1) and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). Jurisdiction is predicated upon 28 U.S.C. §§ 1337, 1345 and 1355, and upon 15 U.S.C. §§ 45 (m)(1)(A), 49, and 53(b).

The complaint states five basic claims arising from the defendants' advertising and door-to-door sales of magazine subscriptions. The United States contends that on numerous occasions of door-to-door sales since May 25, 1976, defendants or their representatives knowingly violated the Cooling-Off Rule in the following ways: (1) customers were not provided with the summary notice of their right to cancel the sales contract required by 16 C.F.R. § 429.1(a); (2) customers were not given properly worded "Notice of Cancellation" forms as required by § 429.1(b); (3) customers were not furnished copies of the "Notice of Cancellation" indicating the date by which they must exercise their right to cancel their purchase, as specified in § 429.1(c); (4) the defendants misrepresented the buyer's right to cancel as referred to in § 429.1(f); (5) upon receipt of a valid Notice of Cancellation from the buyer, the defendants failed to refund within the time prescribed in § 429.1(g) all customer payments made during these sales.

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*Reported in Trade Reg. Rep. ¶ 65,052 at 70,857 (1982-83 Trade Cases).

On a motion for summary judgment, the party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. The evidence presented must be construed in favor of the party opposing the motion, and the opposing party must receive the benefit of all favorable inferences that can be drawn from the evidence. Applying this standard to the case at bar, this court finds that the defendants' motion for summary judgment must be denied, and the plaintiff's motion for partial summary judgment must be granted.

In support of its motion for partial summary judgment, the plaintiff points to five distinct practices relating to defendants' door-to-door magazine sales over an extended period of time subsequent to May 25, 1976, asserts that these are *per se* violations of the Cooling-Off Rule, and that therefore the plaintiff is entitled to summary judgment on the issue of liability. The defendants respond to these allegations not by denying that the challenged conduct occurred, but rather by arguing that the conduct is in fact not proscribed by the Cooling-Off Rule. There thus appear to be no genuine issues of material fact remaining in the case, and resolution as a matter of law is therefore appropriate and necessary.

Initially, plaintiff maintains that the defendants failed to provide buyers with a fully completed copy or receipt of the sales contract containing the prescribed notice summarizing the buyer's right of cancellation. 16 C.F.R. § 429.1(a).[1] Paragraph (a) of the Cooling-Off Rule requires that such a document be given to all buyers in door-to-door sales, and further provides that the mandatory summary notice of cancellation rights be in "substantially the . . . form" designated in the Rule. The defendants argue that their customer receipts have satisfied this "substantial compliance" standard. While it is true that the Rule does give sellers some flexibility in the language used in their summary notices, it is not true that "substantial compliance" contemplates the possibility that summary notices be completely omitted from customer receipts. Customer receipts supplied by the defendant company to its customers since May 1976 fail to contain *any* notice summarizing the customer's right to cancellation on the front of the receipt. See plaintiff's exhibits A1, A2. In this context, the defendants' argument that the *receipts* themselves are in "substantial compliance" with Paragraph (a) of the Cooling-Off Rule is wholly irrelevant in light of the undisputable omission of the mandatory *summary notices*. The defendants' "substantial compliance" argument is thus clearly without merit.

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[1] In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e. g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel the transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

A similar result must obtain with respect to the plaintiff's claim that defendants failed to furnish buyers with properly worded Notices of Cancellation as required by Paragraph (b) of the Cooling-Off Rule.[2] Specifically, the plaintiff points out three deficiencies in the Notices of Cancellation provided by defendants to their customers, which in combination, make the Notice of Cancellation forms used by defendants substantially different from those required by Paragraph (b). First, the forms do not contain the required caption "NOTICE OF CANCELLATION." Second, the forms contain no blank space in which the date by which cancellation must be made can be inserted. Finally, the forms include language not mentioned in Paragraph (b) instructing a customer wishing to cancel to include the contract order number and solicitor's name on the cancellation notice.

Plaintiff contends that the defendants violated Paragraph (b) both by failing to include mandatory language in the Notice of Cancellation forms, and by including additional language whose effect was to misrepresent to consumers their rights to receive refunds. The defendants fail, however, to respond specifically to these assertions, arguing instead that they are being penalized for having excluded from their cancellation notices language regarding return of goods delivered which, although set out in Paragraph (b), is concededly irrelevant to door-to-door sales of magazine subscriptions. The plaintiff is not, however, seeking civil penalties in the instant case for the omission of irrelevant language. Rather, the gravamen of the plaintiff's claim with regard to Paragraph (b) requirements is that improper wording of Notices of Cancellation diminishes the consumer's awareness of his cancellation rights and/or creates confusion as to the expiration date of that right.

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[2] The "Notice of Cancellation" referred to in the context of the requirements of paragraph (b) of the Cooling-Off Rule is a document separate and distinct from the customer receipts containing the "Summary Notice of Cancellation" referred to in Paragraph (A) of the Cooling-Off Rule and in the preceding textral [sic] discussion. Paragraph (b) requires that the Notice of Cancellation be given to each customer at the time he signs the door-to-door sales contract. This Notice must contain the "following information and statements."

Notice of Cancellation

(enter date of transaction)

____

(date)

You may cancel this transaction, without any penalty or obligation, within 3 business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do not agree to return the goods to the seller or if the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice,

(name of seller)

or send a telegram, to ________________________________ at

(address of seller's place of business)

____

(date)

not later than midnight of ________________________________

I hereby cancel this transaction.

(date)

____

(buyer's signature)

____

This court agrees with plaintiff's analysis. Permeating the statement of Basis and Purpose published by the Federal Trade Commission in conjunction with the issuance of the Cooling-Off Rule is a concern that consumers not be manipulated into irreversible purchases by the high-pressure tactics often employed by door-to-door salesmen. 37 Fed. Reg. 22935 *et seq.* (1972). The right of cancellation within the constraints built into the Rule is thus the cornerstone of the Rule itself. This court finds that, given the careful way in which the Federal Trede Commission spelled out procedures intended to ameliorate negative effects of door-to-door sales, any deviation from the explicit language of the Rule which would tend to confuse a customer as to his cancellation rights violates the Rule itself. In the instant case, both the omission of required language and information, and the inclusion of additional language, rendered the Notice of Cancellation forms used by the defendant far less useful to consumers than was contemplated by the Cooling-Off Rule. The use of such forms thus violated Paragraph (b) of the Cooling-Off Rule.

Likewise, Paragraph (c) of the Cooling-Off Rule requires that the Notice of Cancellation form clearly indicate the date on which the cancellation right will expire.[3] The Rule clearly indicates that the exact date for expiration of this right be entered on the Notice of Cancellation. Plaintiff maintains that about 40 percent of the hundreds of defendants' completed Notice of Cancellation forms reviewed either did not contain the required cancellation date, or simply had the date of sale entered as the expiration date. See, Affidavit of Walter G. Haslam ¶ 7D. In light of the concerns regarding consumer manipulation and confusion underlying the Cooling-Off Rule, inclusion of the exact expiration date seems to be intended to eliminate consumer guesswork as to the correct date. In this context, the defendants' argument that "three business days" is sufficient indication of the date by which the consumer's right to cancel must be exercised seems gratuitous, especially given the other deficiencies in the Notices of Cancellation forms regarding the very existence and scope of the right to cancel. Once again, this Court is compelled to conclude that the defendant's Notice of Cancellation forms violated Paragraph (c) of the Cooling-Off Rule.

Similarly, Paragraph (f) of the Rule prohibits a seller from "misrepresent[ing] in any manner the buyer's right to cancel." 16 C. F. R. § 429.1(f). Once again, the plaintiffs cite the inclusion in the Notices of Cancellation of language requiring a buyer desiring to cancel to state both the name of the solicitor making the sale and the contract order number. And again, the defendants sidestep the misrepresentation issue by asserting that their Notices of Cancellation do contain some of the language required by the Rule. In addition, the plaintiffs claim that the defendants' use of form correspondence cards requiring consumers to furnish cancelled checks in order to validate their Notices of Cancellation misrepresents the right to a refund under the Cooling-Off Rule provisions which nowhere require proof of payment by consumers.

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[3] In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to... "(c) Fail, before furnishing copies of the 'Notice of Cancellation' to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation."

Neither party in this case has cited any cases relating to the interpretation of "misrepresentation" by either the Federal Trade Commission or the federal courts. The applicable general principles are, however, well settled. Capacity to deceive, rather than actual deception, is the primary criterion for establishing whether a particular type of conduct amounts to misrepresentation. *In the matter of Grolier, Inc.*, 91 F. T. C. 315, 430 (1978); *Mohawk Refining Corp. v. FTC,* 263 F. 2d 818, 821 (3rd Cir. 1959). The critical factor is the net impression that the challenged conduct is likely to make on the general public. *National Bakers Services, Inc. v. FTC,* 329 F. 2d 365, 367 (7th Cir. 1964). Moreover, in evaluating the tendency of behavior to mislead or deceive, attention should be focused not on the most sophisticated consumers but rather on the least. *Exposition Press Inc. v. FTC,* 295 F. 2d 869, 872 (2nd Cir. 1961).

Applying these standards to the instant case, this court finds that the defendants' requirements that buyers wishing to cancel submit additional information, including proof of payment, not mandated by the Cooling-Off Rule, mislead customers as to their rights to receive refunds. The defendants' argument that proof of payment is necessary to avoid double payment, while possibly relevant to the issue of damages, is inapposite in the context of liability for misrepresentation.

Finally, Paragraph (g) of the Cooling-Off Rule requires sellers of merchandise in door-to-door transactions to honor any valid Notice of Cancellation and refund all payments made under the contract within ten business days after receipt of that Notice. The evidence available to this court indicates that in over thirty-five percent of the approximately three hundred transactions involving valid Notices of Cancellation and issuance of refund checks by defendants, the average time period between receipt of the Notice of Cancellation and issuance of the refund check was in excess of one month, and few if any refunds were ever made within the ten-day period specified by the Rule. See, Haslam Affidavit at ¶ 7F. While the defendants have asserted that compliance with the ten-day requirement is a virtual impossibility,[4] the Federal Trade Commission "believes that the (Cooling-Off) Rule properly places the burden on industry to adopt procedures which will enable it to make a timely refund in the event it chooses to accept a downpayment." 37 Fed. Reg. 22952 (1972). Given the absence of any statutorily authorized excuse for noncompliance with these time limits, and in the face of clear and repeated violations of Paragraph (g) by defendants, this court concludes that the plaintiff is entitled to summary judgment on this aspect of its claim.

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[4] See, FTC Investigative Hearing, July 21, 1980, at 131-7.

Ultimately, defendants' violations of the Cooling-Off Rule will be held to violate 5 U. S. C. § 45(m)(1)(A) only upon a showing that defendants engaged in the challenged conduct either knowing that it was prohibited by the Rule, or with knowledge fairly implied based on objective circumstances. This court finds that defendants Union Circulation and Charles E. Reinhardt had actual knowledge of the provisions of the Cooling-Off Rule during all time pertinent to this lawsuit. The defendants admit to such knowledge in their objections to the plaintiff's statement of material facts (¶ 3). In addition, both Charles Reinhardt and Rhonda Campbell, Union's Vice-President admit familiarity with the Rule, have sought to train office personnel to comply with the Rule's provisions, and have taken steps to assure Union's compliance with the Rule. See Reinhardt depo. at 20-22; Reinhardt Affidavit at 2; FTC Investigative Hearing, July 21, 1980, at 72-77, 188-9.

The defendants advance several arguments in support of their own motion for summary judgment, and in opposition to the plaintiff's motion for partial summary judgment. Unfortunately, the defendants have advanced legal arguments which are both incorrect on their face, and mistakenly characterized as genuine issues of material fact. Initially, the defendants maintain that the plaintiff's application of the Cooling-Off Rule and the civil penalty provisions of the Federal Trade Commission Act is an unconstitutional retrospective or *ex post facto* law. However, both retrospective and *ex post facto* laws involve the imposition of new obligations or disabilities upon transactions or occurrence already past. *Weaver v. Graham*, 450 U. S. 24, 29 (1981); *Ohlinger v. U. S.*, 135 F. Supp. 40 (S.D. Idaho 1955).In the instant case, the United States seeks to recover penalties for defendants' alleged violations of the Cooling-Off Rule occurring subsequent to May 24, 1976, more than two years [*sic*] after the June 7, 1974, enactment of the Cooling-Off Rule. There is thus no retroactive application of any law to the facts of this case.

Defendants also argue that a civil penalty cannot be assessed for an alleged violation of the Cooling-Off Rule because that rule was promulgated prior to the effective date of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U. S. C. § 2301. That act provides for the assessment of civil penalties for trade regulation rule violations. In *United States v. Hertz Corp.*, 1981-1 TRADE CASES ¶ 64,023 at 76,292 (S. D. Fla. 1981), the court expressly noted the existence of a "savings clause" in Section 202(c)(1) of the Magnuson-Moss Act preserving those Rules, like the

Cooling-Off Rule, "for which the bulk of the proceeding had been completed prior to enactment of the [Magnuson-Moss] Act." Moreover, section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U. S. C. § 45(m)(1)(A) imposes civil liability for violation of "any" Commission Rule, without regard to its enactment date. Because the instant case involves only violations occurring after the enactment of the Magnuson-Moss Act, this court finds the *Hertz* reasoning persuasive and holds that the Federal Trade Commission is empowered to seek civil penalties in the case *sub judice*.

This court is equally unconvinced by defendants' contention that the Federal Trade Commission was without statutory authority to promulgate the Cooling-Off Rule. This argument was rejected by the Federal Trade Commission in its statement of Basis and Purpose for the Cooling-Off Rule, 37 Fed. Reg. at 22944 (1972). In addition, the Commission's authority to issue substantive trade regulation rules has been acknowledged in the "savings clause" of the Magnuson-Moss Act, and by at least one court. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F. 2d 672 (D. C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

Section 45(m)(1)(A) of the Federal Trade Commission Act specifically authorizes the Commission to institute a civil proceeding against parties suspected of trade regulation rule violations. This is analogous to the Commission's authority to seek civil penalties for violations of cease and desist orders issued pursuant to § 45(b). See 15 U. S. C. § 45(1). It is reasonable, therefore, for this court to deal with the pending motions for summary judgment in the same manner as similar motions arising out of alleged violations of cease and desist orders have been previously handled. Whether a challenged practice lies within the prohibition of a previous consent order is a question of law capable of resolution by the court on a motion for summary judgment. *United States v. Reader's Digest Ass'n. Inc.*, 662 F. 2d 955, 963 (3rd Cir. 1981). Similarly, this court may find and has found in this case, that the defendants' conduct is outside that permitted by the Cooling-Off Rule. Accordingly, the defendant's motion for summary judgment is Denied, and the plaintiff's motion for partial summary judgment is Granted.

TENNECO, INC.
v.
FEDERAL TRADE COMMISSION*

Docket 81-4225 FTC Docket No. 9097

United States Court of Appeals, Second Circuit
September 16, 1982

1. **Perceived potential and actual potential competition constitute the two theories comprising the potential competition doctrine, as applied in a Section 7 merger suit.**

The potential competition-doctrine, as applied in a Section 7 of Clayton Act suit involving mergers, is divisible into two theories: perceived potential competition and actual potential competition.

2. **Where industry had been highly profitable and four-firm concentration ratios were unusually high, FTC was justified in concluding that relevant market was not generally competitive; acquiring corporation bore burden of showing that unusually high concentration ratios did not accurately reflect competitive conditions in the market.**

Where four-firm concentration in replacement automotive shock absorber market was over 90% and two-firm concentration, with one of those firms being acquired by the 15th largest industrial corporation in United States, was over 77%, it was the acquiring firm's burden, in divestiture proceeding before the Federal Trade Commission, **[347]** to show that those high concentration ratios did not accurately reflect the competitive conditions in the market and since industry had been highly profitable and despite recent indications that profit margin might be decreasing and industry experts foresaw a bright future, the Commission was justified in concluding that the replacement market was not generally competitive and proceeding to assess acquiring corporation's effects on that market.

3. **FTC record lacked substantial evidence necessary to support finding that respondent was a likely potential entrant into relevant market in the near future either de novo or through a toehold acquisition.**

Record in proceeding seeking order requiring manufacturing firm to divest itself of its acquisition of replacement automotive shock absorber manufacturer, which along with another manufacturer accounted for over 77% of replacement shock absorber sales, lacked substantial evidence supporting Federal Trade Commission's finding, on theory of elimination of actual potential competition, that the acquiring corporation was likely to have entered the market in the near future either de novo or through toehold acquisition.

4. **Despite drastic increase in competitive activity prior to respondent's acquisition, record did not support FTC conclusion that respondent violated the Clayton Act by eliminating itself as a perceived potential competitor, since upsurge in competitive activity was not the result of respondent's presence on the market's edge.**

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*Reported in 689 F.2d 346 (1982). For case before the Commission, see 98 F.T.C. 464.

Record contained inadequate evidence to support Federal Trade Commission's conclusion that industrial corporation's acquisition of replacement automotive shock absorber manufacturer, which along with fellow manufacturer accounted for 77% of replacement sales, violated Clayton Act by eliminating the industrial corporation as a perceived potential competitor, in that although competitive activity increased drastically prior to acquisition the upsurge was not related to acquiring corporation's presence on the market's edge.

5. **Reviewing court was required to weigh evidence which FTC ignored and which was contrary to its hypothesis of "edge effect," in order to determine substantiality of evidence supporting FTC's decision.**

Where Federal Trade Commission, in requiring one manufacturer to divest itself of another manufacturer, ignored evidence contrary to its hypothesis of "edge effect," reviewing court was required to weigh that evidence in determining substantiality of evidence to support the commission's decision.

6. **Direct evidence of an "edge effect" is not required to support an FTC finding of a Section 7 violation.**

Direct evidence of an "edge effect" is not required to support a finding of a violation of Clayton Act's prohibition upon mergers where the effect may be substantial to lessen competition or to tend to create a monopoly.

7. **While not required to produce direct evidence that existing oligopolists altered their actions in response to a perception of an acquiring corporation "in the wings," FTC must at least produce circumstantial evidence that present competitors tempered their conduct as a result of acquiring firm's presence.**

Although Federal Trade Commission, in divestiture proceeding, was not required to produce direct evidence that existing oligopolists altered their actions in response to a perception of acquiring corporation "in the wings," it was required to produce at least circumstantial evidence that the latter's presence probably directly affected competitive activity in the market, i.e., an "edge effect."

Petition was filed for review of order of Federal Trade Commission requiring industrial corporation to divest itself of manufacturer of replacement automotive shock absorbers. The Court of Appeals, Meskill, Circuit Judge, held that: (1) record lacked substantial evidence supporting finding that the acquiring corporation was likely to have entered the market in the near future either de novo or through toehold acquisition so as to establish a violation based on elimination of actual potential competition; (2) record contained inadequate evidence to support conclusion that acquisition violated Clayton Act by eliminating acquiring corporation as a perceived potential competitor.

Order set aside.

Mansfield, Circuit Judge, filed dissenting opinion.

(Syllabus, with substituted captions, taken from 689 F.2d 346)

John L. Jeffers, Houston, Tex. (*Alan Gover, Baker & Botts,* Houston, Tex., of counsel), for petitioner.

Howard E. Shapiro, Deputy Gen. Counsel, F.T.C., Washington, D.C. (*John H. Carley,* Gen Counsel, F.T.C., *David C. Shonka,* Washington, D.C., of counsel), for respondent.

Before Mansfield, Meskill and Pratt, *Circuit Judges.***

Meskill, *Circuit Judge*:

Tenneco, Inc. ("Tenneco") petitions pursuant to 15 U.S.C. § 45(d) (1976)[1] for re**[348]** view of a final order of the Federal Trade Commission ("Commission") requiring its divestiture of Monroe Auto Equipment Co. ("Monroe") and prohibiting it from making certain acquisitions for a ten-year period.[2] The Commission, in reversing a decision of **[349]** an Ad-

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**When this appeal was heard, Judge Pratt was a United States District Judge for the Eastern District of New York, sitting by designation. He was inducted as a judge of this Court on June 29, 1982.

[1] 15 U.S.C. § 45(d) (1976) provides:

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

[2] The Commission's order, dated Sept. 23, 1981, reads as follows:

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to reverse in part the initial decision:

IT IS ORDERED that the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent it is inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following order to divest be, and it hereby is, entered:

I

IT IS ORDERED that respondent, Tenneco, Inc. (hereinafter "Tenneco"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all stock, assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, raw material reserves, inventory, customer lists, trade names, trademarks, and other property of whatever description acquired by Tenneco as a result of its acquisition of Monroe Auto Equipment Company (hereinafter "Monroe") together with all additions and improvements to Monroe subsequent to the acquisition. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the service of this Order, and shall be subject to the prior approval of the Federal Trade Commission.

II.

IT IS FURTHER ORDERED that such divestiture shall be accomplished absolutely to an acquirer approved in advance by the Federal Trade Commission so as to transfer Monroe as a going business and a viable, competitive, independent concern.

III.

IT IS FURTHER ORDERED that pending any divestiture required by this Order, respondent shall not knowingly cause or permit the deterioration of the assets and properties specified in Paragraph I in a manner that impairs the marketability of any such assets and properties. Respondent may but shall not be required to make capital expenditures for the improvement of any such assets and properties.

IV.

IT IS FURTHER ORDERED that pursuant to the requirements of Paragraph I, none of the stock, assets, properties, rights, privileges and interests of whatever nature, tangible or intangible, acquired or added by Tenneco, shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of Tenneco or anyone who owns or controls, directly or indirectly more than one (1) percent of the outstanding shares of the capital stock of Tenneco or to anyone who is not approved in advance by the Federal Trade Commission.

V.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, Tenneco shall cease and desist from acquiring, or acquiring and holding, directly or indirectly, through subsidiaries or otherwise,

(*footnote continued*)

ministrative Law Judge ("ALJ"), found that Tenneco's 1977 acquisition of Monroe violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976),[3] by eliminating potential competition in the market for replacement automotive shock absorbers. We grant Tenneco's petition for review and set aside the Commission's order.

A. BACKGROUND

1. *The Companies*

Tenneco is a diversified corporation whose operations include the manufacture and distribution of automotive parts. In 1975, Tenneco was the fifteenth largest industrial corporation in the United States with over $6.58 billion in assets and revenues exceeding $5.63 billion. Tenneco's Walker Manufacturing Division ("Walker"), which was responsible for Tenneco's automotive parts operations at the time of the events giving rise to this case, was the nation's leading seller of exhaust system parts in 1975 and 1976. Walker also manufactured hydraulic jacks, air jacks, mechanical scissors jacks, oil seals and automotive filters. Walker distributed steering dampers and other automotive parts through a subsidiary. Walker's exhaust system parts business accounted for most of its revenues.

Monroe, which was established before World War II, has become a leading manufacturer of automotive shock absorbers. Monroe has concen-

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(*footnote continued from previous page*)

> without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any concern, corporate or noncorporate, engaged in the business of manufacturing, distributing, or selling, shock absorbers, nor shall Tenneco for a period of ten (10) years from the date this Order becomes final enter into any agreement, understanding or arrangement with any such concern by which Tenneco obtains the market share, in whole or in part, of such concern in the above described product lines, without the prior approval of the Federal Trade Commission.
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> VI.
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> IT IS FURTHER ORDERED that for a period of ten (10) years from the effective date of this Order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this Order, Tenneco shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Tenneco to make public its desire to divest Monroe, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.
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> VII.
>
> IT IS FURTHER ORDERED that Tenneco shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this Order shall be binding in any such successor.

J. App. 188-90.

[3] Section 7 of the Clayton Act provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1976).

trated its operations on production of replacement shock absorbers: In fiscal 1976, for example, over 80% of Monroe's output was sold for use as replacement equipment for worn or damaged shock absorbers. *See* section A. III, *infra*. The company experienced significant growth during the 1960s and early 1970s, but suffered decreased earnings in the years immediately preceding its acquisition by Tenneco. The parties offer conflicting explanations for Monroe's financial downturn and somewhat differing predictions of Monroe's future.

II. *The Product*

Automotive shock absorbers facilitate vehicle control "by keeping the wheels on the road, reducing sway and roll on curves, reducing bottoming, dampening vibrations, [and] controlling wheel hop." ALJ's Findings, J. App. at 70, ¶ 26. In addition, they increase driving comfort by "smoothing the ride." Id. Shock absorbers consist of one or more steel tubes which contain a hydraulic cylinder, a piston and a rod which move through the cylinder, hydraulic valves and fluid, springs, seals and bearings. Although they take several forms, all shock absorbers perform similar functions. A conventional shock absorber is mounted vertically between the vehicle body and a wheel. The same is true of McPherson strut shock absorbers (or "struts"), a relatively new design combining the shock absorber with other portions of the vehicle's suspension. The McPherson strut has become increasingly popular, especially for small cars, because its wheel suspension method is more compact than conventional designs. Steering dampers, another form of shock absorber, are mounted horizontally between the front wheels of a vehicle. Steering dampen are designed to dampen road shocks and oscillations in the steering system and differ from conventional shocks principally in mounting hardware. **[350]**

III. *The Market*

Shock absorbers are distributed through two distinct channels: the original equipment channel and the replacement channel. The original equipment channel consists of sales to manufacturers for use on new vehicles. The replacement channel consists of sales to outlets that install shock absorbers on vehicles already in use as replacements for worn or damaged equipment.

In the years relevant to this case, the replacement channel was highly concentrated, with the four leading manufacturers accounting for over 90% of total sales in both 1975 and 1976: Monroe, the number two firm, and Maremont, the parent company of industry leader Gabriel, collectively accounted for over 77% of replacement shock absorber sales in 1976; Questor and General Motors together accounted for approximately 15% of sales in the same year. Gabriel, Monroe, Questor and General Motors have occupied the top four positions in the replacement market at least since the late 1960s, with Monroe holding either the first or second position since the beginning of that decade.

Substantial barriers, the most significant of which may be economies of scale in the industry, discourage entry into the market for replacement shock absorbers. The parties agree that a shock absorber plant operating at minimum efficient scale would produce six million units annually, which is approximately 10% of total replacement shock absorber sales. Other barriers to entry include the need for technology and marketing skills peculiar to the industry and the significant time lags associated with establishing a plant and penetrating the market to the extent necessary to achieve a reasonable rate of return on investment.

IV. *The Commission's Opinion*

Against the background outlined above, the Commission concluded that the relevant market for antitrust analysis was the market for replacement shock absorbers, including conventional shock absorbers, McPherson struts and steering dampers. While the Commission found that competitive performance in this highly concentrated market "improved substantially" "in the years just prior to the [Tenneco-Monroe] merger," it attributed the market's "improved economic performance" to "industry fears that Tenneco was likely to attempt entry." Commission Opinion at 13-14, J. App. at 203-04. In other words, the Commission believed that Tenneco was exerting an "edge effect" on the industry, causing existing manufacturers to compete aggressively in an attempt to discourage entry by Tenneco. The Commission concluded that once Tenneco acquired Monroe and was no longer perceived as a potential independent competitor, the "edge effect" disappeared. The Commission predicted that as a result manufacturers would revert to the anticompetitive, oligopolistic activities that typify competitors in a highly concentrated market. *Id.* The Commission also ruled that in addition to this alleged "edge effect," which is grounded in industry perceptions, Tenneco was in fact likely to enter into the independent manufacture of replacement shock absorbers in competition with existing producers. This likelihood vanished upon the Tenneco-Monroe merger. For these reasons the Commission ruled that "the effect of [Tenneco's] acquisition [of Monroe] is likely to lessen competition substantially in the sale of replacement shock absorbers through the elimination of both perceived and actual potential competition in violation of both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act."[4] Commission Opinion at 68, J. App. at 258.

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[4] Section 5 of the Federal Trade Commission Act provides in pertinent part:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

15 U.S.C. § 45(a)(1) (1976).

B. DISCUSSION

Tenneco challenges both the Commission's definition of the relevant market and **[351]** its findings with respect to Tenneco's effect on that market as a potential competitor. The parties agree that our consideration of these issues is governed by the "substantial evidence" standard of review. Under that standard,

> the Commission's findings of fact, "if supported by substantial evidence, shall be conclusive," 15 U.S.C. § 21(c), and we may not substitute our inferences for those drawn by the Commission simply because we might have evaluated the facts differently as an original matter. See *FTC v. Pacific States Paper Trade Ass'n,* 273 U.S. 52, 63, 47 S.Ct. 255, [258] 71 L.Ed. 534 (1927); *Simeon Management Corp. v. FTC,* 579 F.2d 1137, 1142 (9th Cir. 1978). However, the Commission's findings must be supported by substantial evidence and there must also be a rational connection between those findings and its conclusions.

Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979).

Even assuming that the Commission's market definition is supported by substantial evidence, we hold that the Commission's findings on the elimination of potential competition are not. Accordingly, we do not address Tenneco's challenges to the market definition, but move directly to the potential competition issues.

1. *The Clayton Act and Potential Competition*

[1] The Supreme Court summarized the purpose of Section 7 of the Clayton Act and its relationship to the doctrine of potential competition in *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 531-32, 93 S.Ct. 1096, 1099-1100, 35 L.Ed.2d 475 (1973):

> Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly. The section proscribes many mergers between competitors in a market, *United States v. Continental Can Co.,* 378 U.S. 441 [84 S.Ct. 1738, 12 L.Ed.2d 953] (1964); *Brown Shoe Co. v. United States,* 370 U.S. 294 [82 S.Ct. 1502, 8 L.Ed.2d 510] (1962); it also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition, *FTC v. Procter & Gamble Co.,* 386 U.S. 568, 578-580 [87 S.Ct. 1224, 1230-1231, 18 L.Ed.2d 303] (1967). Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. *Id.,* at 580-581 [87 S.Ct. at 1231-1232]; *United States v. Penn-Olin Chemical Co.,* 378 U.S. 158, 173-174 [84 S.Ct. 1710-1718, 12 L.Ed.2d 775] (1964). As the Court stated in *United States v. Penn-Olin Chemical Co., supra,* at 174 [84 S.Ct. at 1718], "The existence of an aggressive,

> well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

As later explained by the Court in *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 624-25, 94 S.Ct. 2856, 2871-2872, 41 L.Ed.2d 978 (1974), the potential competition doctrine is divisible into two theories: perceived potential competition and actual potential competition. The Commission found that Tenneco had violated section 7 under both theories.

The Supreme Court has described the theory of perceived potential competition, which it has approved for application to cases brought under Section 7 of the Clayton Act, *see, e.g., Marine Bancorporation,* 418 U.S. at 625, 94 S.Ct. at 2871; *Falstaff Brewing Corp.*, 410 U.S. at 531-37, 93 S.Ct. at 1099-1103, as "the principal focus of the [potential competition] doctrine." *Marine* **[352]** *Bancorporation,* 418 U.S. at 624, 94 S.Ct. at 2871.

> In developing and applying the [perceived potential competition] doctrine, the Court has recognized that a market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market. In other words, the Court has interpreted § 7 as encompassing what is commonly known as the "wings effect"—the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter *de novo*.

Id. at 624-25, 94 S.Ct. at 2871-2872.

The actual potential competition theory, which has yet to receive sanction from the Supreme Court or this Court, *see, e.g., id.* at 625, 639, 94 S.Ct. at 2871, 2878; *United States v. Siemens Corp.*, 621 F.2d 499, 504 (2d Cir. 1980), would

> proscribe[ ] a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a *de novo* undertaking or through the acquisition of a small existing entrant (a so-called foothold or toe-hold acquisition).

Marine Bancorporation, 418 U.S. at 625, 94 S.Ct. at 2871.

> The theory of the [actual potential competition] doctrine is that competition in the market would be enhanced by the addition of the new competitor and therefore the elimination of such a potential competitor would substantially lessen competition within the meaning of §7.

Siemens Corp., 621 F.2d at 504.

The Commission established two independent grounds on which to base its ruling that Tenneco's acquisition of Monroe violated section 7 by finding that the acquisition eliminated both actual and perceived potential competition in the market for replacement shock absorbers. Tenneco challenges both grounds, arguing that the record is inadequate to support the factual findings underlying them. We will discuss the substantiality of the evidence underlying both halves of the Commission's case, addressing first the findings relating to actual potential competition.

II. *Actual Potential Competition*

To establish a violation of section 7 in this case based upon the elimination of actual potential competition, assuming for the moment that the doctrine is valid, the Commission must show: (1) that the relevant market is oligopolistic; (2) that absent its acquisition of Monroe, Tenneco would likely have entered the market in the near future either *de novo* or through toehold acquisition; and (3) that such entry by Tenneco carried a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects. *See Marine Bancorporation,* 418 U.S. at 630, 633, 94 S.Ct. at 2874, 2875; *Siemens Corp.,* 621 F.2d at 505; *BOC International Ltd. v. FTC,* 557 F.2d 24, 29 (2d Cir. 1977). Tenneco argues that the Commission's findings on the relevant market and the likelihood of entry lack substantial record support.

[2] Tenneco's challenges to the Commission's conclusion that the market for replacement shock absorbers was oligopolistic are not persuasive. Tenneco concedes that the concentration ratios in the market, "the primary index of market power," *Brown Shoe Co. v. United States,* 370 U.S. 294, 322 n. 38, 82 S.Ct. 1502, 1522 n. 38, 8 L.Ed.2d 510 (1962), were extraordinarily high during the relevant period: Four-firm concentration was over 90% and two-firm concentration was over 77%. Brief for Tenneco at 18. This fact alone "established a prima facie case that the . . . market was a candidate for the potential-competition doctrine."**[353]** *Marine Bancorporation,* 418 U.S. at 631, 94 S.Ct. at 2874. Therefore, it was Tenneco's burden to show that these high concentration ratios did not accurately reflect the competitive conditions in the market. *Id.* Tenneco, however, showed only that in 1974 the market for replacement shock absorbers suffered from decreased earnings apparently caused by falling prices, suggesting a more competitive market than the high concentration ratios would reflect. Tenneco argues that this evidence of increased competition, combined with the Supreme Court warning that high concentration ratios are not alone conclusive, *United States v. General Dynamics Corp.,* 415 U.S. 486, 498, 94 S.Ct. 1186, 1194, 39 L.Ed.2d 530 (1974); *see Brown Shoe Co.,* 370 U.S. at 321-22 & n. 38, 82 S. Ct. at 1521-1522 & n. 38, 8 L.Ed.2d 510, undermines the Commission's finding that the market for replacement shock ab-

sorbers was sufficiently concentrated and anticompetitive to justify application of the potential competition doctrine. We disagree.

The record establishes that the structure, history and probable future of the market for replacement shock absorbers—the factors that the Supreme Court identified as proper considerations in addition to concentration ratios, *General Dynamics Corp.*, 415 U.S. at 498, 94 S.Ct. at 1194; *Brown Shoe Co.*, 370 U.S. at 322 n. 38, 82 S.Ct. at 1522 n. 38, 8 L.Ed.2d 510—are all consistent with the Commission's finding. The extraordinarily high concentration ratios have remained stable over many years with the same firms occupying the top four positions since at least the late 1960s. Substantial barriers to entry severely limit the number of firms likely to provide additional competition. *See* section A. III, *supra*. The industry has been highly profitable, and despite recent indications that profit margins may be decreasing, industry experts, including Tenneco executives, foresee a bright future. Based upon this evidence, the Commission was fully justified in concluding that the replacement shock absorber market was not genuinely competitive and in proceeding to assess Tenneco's effects on that market.

[3] Nevertheless, we reject the Commission's finding that Tenneco was an actual potential entrant likely to increase competition in the market for replacement shock absorbers. The record lacks substantial evidence supporting the Commission's finding that Tenneco was likely to have entered the market for replacement shock absorbers in the near future either *de novo* or through toehold acquisition. *See Marine Bancorporation,* 418 U.S. at 633, 94 S.Ct. at 2875; *Siemens Corp.*, 621 F.2d at 505; *BOC International Ltd.*, 557 F.2d at 29.

The record contains abundant evidence that Tenneco had both the interest and the incentive to enter the market for replacement shock absorbers. The Commission relied upon internal Tenneco and Walker documents identifying shock absorbers as complementary to Walker's exhaust system products line and urging entry into the shock absorber market. In addition, uncontradicted evidence revealed that Tenneco had negotiated with major European shock absorber manufacturers regarding possible acquisitions or license arrangements and had actually acquired a small manufacturing company that held a patent on a new shock absorber design. The record strongly supports the conclusion that Tenneco was actively considering entry into the market and was pursuing all leads to that end at least since the late 1960s or early 1970s. Moreover, Tenneco clearly possessed adequate financial resources to make the large initial investment needed to attempt to penetrate the market. The record, however, is deficient in evidence that there were viable toehold options available to Tenneco or that Tenneco would have entered the market *de novo*.

The Commission conceded in its opinion that Tenneco never expressed any interest in entering the market for replacement shock absorbers "on a completely *de novo* basis." Commission Opinion at 57, J. App. at 247.

However, the Commission found that Tenneco had expressed interest in entering the market essentially *de novo,* building the required production facilities from **[354]** scratch and acquiring the necessary technology via a license from an established foreign shock absorber producer, *id.* at 57-58, J. App. at 247-48. The Commission concluded that Tenneco would likely have done so absent its acquisition of Monroe.

The Commission's reasoning is flawed. It ignores Tenneco's decision not to enter the market during the 1960s and early 1970s, a period of high profitability for shock absorber manufacturers, because of anticipated inadequate earnings during early years. The record is devoid of evidentiary support for the Commission's assertion that in the period relevant to this case, when industry earnings were in decline, Tenneco would have been willing to suffer the "cost disadvantage" inherent in the building of an efficient scale plant that would remain underutilized "for a number of years." Commission Opinion at 59 n. 61, J. App. at 249. The Commission's conclusion that Tenneco would have entered the market *de novo* with the aid of a license absent its acquisition of Monroe is based on the kind of unsupported speculation that the Supreme Court condemned when it warned that we should "remember [ ] that § 7 deals in 'probabilities,' not 'ephemeral possibilities.'" *Marine Bancorporation,* 418 U.S. at 622-23, 94 S.Ct. at 2870-2871 (quoting *Brown Shoe Co.,* 370 U.S. at 323, 82 S.Ct. at 1522).

The Commission's conclusion that Tenneco would likely have entered the replacement shock absorber market through toehold acquisition is similarly flawed. The Commission identified Armstrong Patents, Ltd. ("Armstrong"), a British shock absorber manufacturer, DeCarbon Shock Absorber Co. ("DeCarbon"), a French company, and Blackstone Manufacturing Corp. ("Blackstone"), a small United States producer of shock absorbers, as potential toeholds.[5] However, the record reveals that Tenneco in fact negotiated unsuccessfully with Armstrong and DeCarbon. Armstrong management indicated that Tenneco would have to offer a 100% premium over the market price of its stock to generate its interest. Tenneco's negotiations with DeCarbon, which were conducted through an independent broker, were equally fruitless. DeCarbon had asked a selling price of 100 times its earnings. In addition, there was testimony that the French Ministry of Industry had the authority and probably the inclination to disallow such an acquisition.

Despite recognizing the failure of Tenneco's negotiations with Armstrong and DeCarbon, the Commission again retreated to speculation, asserting that continued negotiations could have produced favorable results. As we stated above, speculation does not provide an adequate basis for a finding of a section 7 violation. The Commission cannot negate the strong evidence that Armstrong and DeCarbon were not reasonably available with a bald prediction that the situation might change in the future.

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[5] As noted earlier in this subsection, Tenneco has already acquired a very small manufacturing company, Triple S Industries, that held a patent on a new and unproven shock absorber design, the Terramatic. While the Commission viewed this acquisition as contributing to Tenneco's ability to manufacture shock absorbers, *see* Commission Opinion at 20-22, J. App. at 210-12, and as exhibiting Tenneco's interest in the market, *see id.* at 35-38, J. App. at 225-28, it did not address the Triple S acquisition in its discussion of Tenneco's potential *de novo* or toehold entry, *see id.* at 57-67, J. App. at 247-57. Accordingly, we infer that the Commission did not consider the Terramatic patent sufficient technology to facilitate *de novo* entry or Triple S as a viable vehicle for toehold entry.

As for Blackstone, the Commission itself described that company as "a small, struggling domestic firm . . . burdened with aged equipment, a less than complete product line . . ., declining market share and a mediocre reputation." Commission Opinion at 61, J. App. at 251. Since 1974, Blackstone had unsuccessfully sought a buyer for its business, soliciting, among others, Midas International Corp., which operates a chain of muffler installation shops, and Questor. Nevertheless, the Commission remarkably concluded that Blackstone "would have served as a viable method of toehold entry, although this route would have been more difficult and less attractive than the acquisition of a substantial foreign firm." *Id.* We do not believe that the Commission's **[355]** assertion that Tenneco would have acquired a weak and deteriorating firm with a poorly accepted product and run-down equipment in which neither Tenneco nor any other company had shown significant interest satisfies the requirement that a finding of a section 7 violation be based on "probabilities." *See Marine Bancorporation,* 418 U.S. at 622-23, 94 S.Ct. at 2870-2871 (quoting *Brown Shoe Co.,* 370 U.S. at 323, 82 S.Ct. at 1522).

Because we hold that the Commission's findings and conclusions with respect to Tenneco as an actual potential competitor in the market for replacement shock absorbers are unsupported by substantial record evidence, we need not reach the issue of the validity of the actual potential competition doctrine.

III. *Perceived Potential Competition*

[4] We also conclude that the record contains inadequate evidence to support the Commission's conclusion that Tenneco's acquisition of Monroe violated section 7 by eliminating Tenneco as a perceived potential competitor in the market for replacement shock absorbers.

> In order to make out a "perceived" potential competition case the [Commission], in addition to showing a market highly concentrated among a few firms, must prove that the acquiring company is (1) perceived by existing firms in the market as a potential independent entrant, and (2) has exercised a tempering impact on the competitive conduct of existing sellers.

Siemens Corp., 621 F.2d at 505 (footnote omitted). *See also Marine Bancorporation,* 418 U.S. at 624-25, 94 S.Ct. at 2871-2872. Tenneco once again challenges the Commission's findings on each of these elements, including the finding of a highly concentrated market, which we have already addressed in section B. II, *supra.*

There is abundant evidence that the oligopolists in the market for replacement shock absorbers perceived Tenneco as a potential entrant. Industry executives testified that they considered Tenneco one of very few manufacturers with both the incentive and the capability to enter the market. This perception was based on Tenneco's financial strength and on the compatibility of shock absorbers with exhaust system parts produced by Tenneco's Walker Division. This testimony was enhanced by evidence that the negotiations between Tenneco and DeCarbon were initiated by an independent broker and that the negotiations that eventually led to the Tenneco-Monroe merger were initiated by Monroe, indicating that those in the industry were aware of Tenneco's interest. This, especially when combined with the fact that industry participants were apparently not privy to the lack of success in Tenneco's toehold acquisition negotiations, is more than sufficient to satisfy the substantial evidence requirement with respect to industry perceptions of Tenneco as a potential entrant.

However, the analysis does not end here. The Commission's conclusion that the perception of Tenneco as a potential entrant actually tempered the conduct of oligopolists in the market must also be supported by substantial evidence. It is not.

Throughout this case, Tenneco has argued that in the years immediately preceding its acquisition of Monroe the market for replacement shock absorbers had become highly competitive. The Commission apparently agrees with this assessment. Commission Opinion at 13, J. App. at 203. The rate of increase in advertised retail prices for shock absorbers fell significantly behind inflation, and so-called mass merchandisers such as Sears Roebuck replaced traditional wholesale distributors as the leading purchasers of replacement shock absorbers from manufacturers. Sears retail prices for shock absorbers were frequently below the prices that manufacturers charged wholesale distributors, who were several levels above the retail customer in the traditional chain of distribution. The advent of increased sales by mass merchandisers coincided with aggressive competition among shock absorber manufacturers. Manufacturers offered substantial discounts off their circulated price sheets to traditional wholesalers and imple**[356]**mented "stocklifting," a practice in which a manufacturer buys a wholesaler's inventory of a competing manufacturer's product and replaces it with his own product. Perhaps the most aggressive and certainly the most successful manufacturer was Maremont, which acquired Gabriel in 1962. At the time of the acquisition, Gabriel was, in the Commission's words, "in a downward trend," *id.* at 64, J. App. at 254, and ranked third in the industry with a market share of between 10% and 20%, J. App. at 1650-51. After the acquisition, Maremont undertook an aggressive campaign to improve its position. Since that time, "Gabriel's market share has at least doubled and has possibly increased four-fold. Maremont today is the number one firm in the replacement shock absorber market." Commission Opinion at 64, J. App. at 254.

While agreeing that competitive activity increased dramatically in the mid-1970s, the Commission stated:

> [W]e disagree with [Tenneco] over the cause of that new competitive vigor. In brief, we find that the source of the improved economic performance lay in industry fears that Tenneco was likely to attempt entry—an actual "edge effect"—rather than in the buyer power supposedly asserted by mass merchants against their suppliers.

Commission Opinion at 13-14, J. App. at 203-04. The Commission's hypothesis depends almost entirely on inferences drawn from the activity of Maremont. The Commission pointed to the testimony of Byron Pond, Senior Vice-President and Director of Maremont, who stated:

> the attractive nature of the shock absorber business has caused us to invest because of the opportunities and also to invest because, if we didn't invest, someone else would.
>
> . . .
>
> . . . One of the ways that you strengthen your position in a business and restrict or limit the amount of competition that you are faced with is to make considerable efforts to become a low-cost producer.

J. App. at 679-80. The Commission inferred from this testimony that Maremont's "efforts to 'restrict or limit' competition were in large measure aimed at deterring a destabilizing *de novo* or toehold Tenneco entry." Commission Opinion at 53, J. App. at 243. The Commission analyzed other Maremont activities as follows:

> Maremont testified that it invested heavily in inventory to improve the quality of its service, its rate of "order fill," to a level substantially higher than the industry standard then in effect. The record does not reveal competitive pressure from Monroe or others within the replacement shock absorber market to improve service, but an extraordinary level of order fill could be a useful weapon against a feared potential entrant. One obvious impact is in raising the investment in inventory needed by a potential entrant to compete in winning over new accounts, making entry more expensive. Providing improved service to its accounts also can reasonably be expected to increase the loyalty of those accounts to Maremont, to increase the difficulty facing a new entrant in winning market shares generally, and to push whatever loss did arise onto Monroe or others. Finally, there is the possibility that Maremont was responding to an expectation that Tenneco, upon entering, would set a high standard of service, comparable to what it was already providing in the replacement [exhaust system parts] market.
>
> Similarly, a better explanation for Maremont's cost-cutting and cost-absorption can be found in fear of potential entry than in the actual competition which then faced the firm. One would not expect a firm in such a concentrated market voluntarily to absorb cost increases and thereby cut its rate of return. Rather, one would expect Maremont merely to pass such increases through in the reasonable expectation that its one main competitor will find that enlightened self interest lay in following a similar course.
>
> Even investments in cost-cutting, which generally would appear not to be inhibited by a high level of concentration, **[357]** as the payoff from that investment could be retained by the firm, here appear motivated by fear of potential entry rather than by the present competition facing Maremont. Maremont, it must be noted, had a large proportion of its sales, 41%, going to one account, Sears, Roebuck and Co., and an additional 14% going to three other mass merchants. Although the record does not disclose the nature of Maremont's contractual

> relationships with these other big accounts, it does demonstrate that the Sears contract provided for payment on a *cost-plus* basis, *i.e.*, projected actual cost for the contract year plus a fixed percentage of that cost as Maremont's return. This arrangement is significant for it limits the return which Maremont could obtain from investments in new, cost-saving technology. Thus, the benefit to Maremont of investment in this area is substantially less than it would otherwise seem to be.
>
> Investment in cost-reducing technology, however, might be completely justified as an attempt to deter entry by Tenneco, or to be better prepared for more rigorous competition following entry. Indeed, Maremont recognized that Tenneco was a highly efficient [exhaust system parts] manufacturer.
>
> In conclusion, we find that the various improvements in the competitiveness of the replacement shock absorber market in the pre-merger period cannot be adequately explained by factors indigenous to that market. Rather, the competitive upsurge appears closely related to the presence of Tenneco poised on the market's edge, in short, an actual edge effect.

Commission Opinion at 54-57, J. App. at 244-47 (footnotes and citations omitted).

[5] Whatever might be our conclusion on the substantiality of this evidence standing alone to support the Commission's findings, a review of the record reveals that the Commission ignored evidence contrary to its hypothesis. We must weigh this evidence in our review of the substantiality of the record evidence. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

The Commission appears to have disregarded in this portion of its analysis evidence of the precarious condition of Gabriel at the time it was acquired by Maremont. As we noted above, the Commission described Gabriel as a firm in "a downward trend" when Maremont took it over and began to implement the aggressive competitive measures which the Commission concluded were prompted by a perception of Tenneco "on the wings." We find it somewhat remarkable that, apparently aware of Maremont's shaky position in the replacement shock absorber market and its resultant need to improve that position and increase its market share, the Commission could conclude starkly: "The record does not reveal competitive pressure from Monroe or others within the replacement shock absorber market to improve [the quality of its] service. . . ." *Id.* at 54, J. App. at 244. Equally striking is the Commission's statement that, because the industry was highly concentrated, Maremont would not voluntarily absorb cost increases and decrease its rate of return. We cannot understand how else Maremont could attract customers away from industry leader Monroe and others. The Commission's conclusion that Maremont's activity cannot be explained by a need to compete against those already in the market is clearly contrary to the record as well as common sense.

In its brief to this Court, the Commission attempts to resurrect its conclusion by noting that it need not "trace competitive conduct [in a concentrated market] 'directly and solely' . . . to the perception of a firm's presence on the edge of the market." Brief for Commission at 52. Rather, the Commission argues that it need only produce enough evidence from which one might draw a reasonable inference that the competitive activities "were 'at least in part' attributable to [industry participants] perception[s] of [a potential competitor's] presence in the wings." *Id.* at 55. **[358]**

[6] We have no doubt that direct evidence of an "edge effect" is not required to support a Commission finding of a section 7 violation. *See Falstaff Brewing Corp.*, 410 U.S. at 534 n.13, 93 S.Ct. at 1101 n.13. In this case, however, direct evidence concerning Tenneco's "edge effect" on Maremont was elicited by the Commission, though it does not support the Commission's conclusion. During the testimony of Bryon Pond, Senior Vice-President and Director of Maremont, the following colloquy occurred:

> Q. [By Commission Counsel:] Did the presence of Walker, IPC or Midas and/or TRW as likely potential entrants into the shock absorber market, have any effect on Maremont's decisions, business decisions?
> A. [By Mr. Pond:] I don't think that we looked specifically at competitors on a periodic basis or potential competitors, in developing our strategy. I think we developed our strategy and approach to the business based on how we perceive it and how we perceived the opportunities. . . .

J. App. at 678-79. The Commission dismissed this testimony, arguing that the fact that Maremont did not take Tenneco directly into account was unimportant in a section 7 case "which is concerned with the probable anticompetitive impacts of acquisitions." Commission Opinion at 54, J. App. at 244.

[7] The Commission's analysis of Mr. Pond's testimony confuses "direct evidence" with "evidence of a direct effect." The Commission is correct that it need not produce direct evidence that Maremont altered its actions in response to a perception of Tenneco "in the wings." However, it must produce at least circumstantial evidence that Tenneco's presence probably directly affected competitive activity in the market. *Marine Bancorporation,* 418 U.S. at 625, 94 S.Ct. at 2871 (To prove a potential competition case, the moving party must show that "the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market.")(emphasis added); *Siemens Corp.*, 621 F.2d at 509 ("A claim of 'perceived' potential entry will not be upheld in the absence of evidence that present competitors have altered or tempered their conduct as a result of the acquiring firm's presence."). Moreover, when determining the substantiality of that circumstantial evidence, we must consider all other record evidence that "fairly detracts from its weight." *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct. at 464. Mr. Pond's testimony constitutes direct evidence that Tenneco had no direct effect on Maremont's business decisions or competitive activity. In the face of this contrary and unchallenged direct evidence, the substantiality of circumstantial evidence arguably suggesting an "edge effect" vanishes. Accordingly, we hold that the Commission's finding that

Maremont's actions were probably taken in response to its desire to dissuade Tenneco from entering the market is unsupported by substantial evidence in the record. Our reading of Mr. Pond's testimony and our conclusions with respect to its effect on the substantiality of evidence underlying the Commission's findings are buttressed by the ALJ's finding that the evidence was insufficient to show an "edge effect" exerted by Tenneco. "[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [Commission's] than when he has reached the same conclusion." *Id.* at 496, 71 S.Ct. at 468.

Conclusion

For the foregoing reasons, we grant Tenneco's petition for review and set aside the Commission's order.

So ordered.

Mansfield, *Circuit Judge* (dissenting):

I respectfully dissent. In my view the Commission's findings — that Tenneco, prior to its acquisition of Monroe, was perceived as a potential competitor in the highly concentrated replacement market by the four top shock absorber manufacturers (which account for 92% of all sales) and that at **[359]** least one of them (Maremont) was thereby led to engage in additional competitive activity — are supported by substantial evidence and should be upheld. The majority, while giving lip service to the substantial evidence rule, nevertheless makes the mistake of substituting its fact-finding for that of the Commission.

The Commission, after a thorough and painstaking review of a voluminous record, made detailed findings to the effect that the replacement shock absorber business represented a separate market, that it is highly concentrated, and that a "perceived potential competition" case had been established within the requirements specified by the Supreme Court in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-32, 93 S.Ct. 1096, 1099-1100, 35 L.Ed.2d 475 (1973), and *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631, 94 S.Ct. 2856, 2874, 41 L.Ed.2d 978 (1974). *See also United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980). My two colleagues agree that almost all of the Commission's findings are supported by substantial evidence. For instance they acknowledge that there is a separate replacement shock absorber market, that it is oligopolistic, with high entry barriers, and that Tenneco was perceived by existing manufacturers as a strong potential competitor. These findings are based on more than ample proof.

The shock absorber business is highly concentrated by any standards, whether one applies the Herfindahl-Hirshman Index now used by the Attorney General of the United States in the Department of Justice's latest

"Guidelines" promulgated on June 30, 1982, see Fed.Reg. 38,493 [sic 28,493] (1982); or the former "4-firm" test used in its pre-existing guidelines issued on May 30, 1968. The four leading manufacturers (Maremont, Monroe, Questor and General Motors) account for 92% of the sales in the replacement market. Of these the two largest (Maremont and Monroe) control 77%. In the words of the majority "the Commission was fully justified in concluding that the replacement shock absorber market was not genuinely competitive." (Maj. Opin. p. 353).

The market is also characterized by high barriers to entry. An entrant must have a large plant (with capacity to furnish at least 10% of the market's needs) in order to operate effeciently and economically. It must have a nationwide distribution network for making prompt deliveries to wholesalers. It must advertise extensively to differentiate its product from others, and it must acquire the technology needed to design and produce competitively saleable shock absorbers.

Tenneco, a major conglomerate (ranking in 1975 as the 15th largest industrial enterprise in the United States) met all of these requirements and had a strong motive to enter. Its Walker Manufacturing Division ("Walker") is a major producer of auto exhaust system parts which it sells primarily in the replacement market. There is a strong market affinity and compatibility between the sale of exhaust system parts and the sale of replacement shock absorbers, which makes it natural, economical and logical for a manufacturer of one to engage in the other, using the same shipping, warehouse, sales and customer-installation facilities for both. Each is an "under the car product." The technologies, manufacturing processes, material components and sales organizations for the two products overlap in substantial and economically significant ways. Tenneco, as a dominant figure in the replacement exhaust system parts market, had the administrative, research and market skills needed to enter the replacement shock absorber market, as well as financial strength, a nationwide organization and facilities, plus technological skill in manufacturing hydraulic and air powered jacks, which involve many of the features of shock absorbers. Indeed, until it acquired Monroe, it was the only major manufacturer of exhaust system parts which did not fully engage in the production of shock absorbers. (Prior to the acquisition it had only bought, repackaged and sold some shock absorbers to muffler shops.) Lastly, the replacement shock absorber market, despite its ups and downs, has been consistently profitable. **[360]**

None of the foregoing is disputed by the majority. Nor does it deny that the record evidence fully supports the Commission's finding that Tenneco, prior to its acquisition of Monroe, was viewed by the members of the highly concentrated oligopoly as a likely entrant. The majority concedes that "[t]here is abundant evidence that the oligopolists in the market for replacement shock absorbers perceived Tenneco as a potential entrant." (Maj.

Opin. p. 355). Indeed, the evidence is overwhelming. Byron O. Pond, Jr., Senior Vice-President and Director of Maremont, the largest of the four manufacturers of shock absorbers, testified that his company considered Tenneco to be a likely entrant into the market, noting that "the shock absorber business has been a very profitable and lucrative business and one that would be an enticing one to be in." (App. 679). Similarly, Paul Putman, Chairman of Questor, another one of the "Big Four," testified that Tenneco not only had the ability to enter the manufacture and sale of shock absorbers without acquiring Monroe but, as Questor had done, Tenneco "could have set up a facility and hired the proper technical people and the production people and the marketing people . . . and I think they would have gotten their share of the business, same as we did." (App. 750-51). Nor were their perceptions of entry lacking in foundation.

Existing manufacturers were fully aware that Tenneco had publicly demonstrated a strong and growing interest in entering the shock absorber market. In 1974 it had acquired Triple S, a small manufacturer of steering dampers and hydraulic steering stabilizers (both of which are akin to shock absorbers), holding patents on a new type shock absorber, the "Teramatic," which had certain advantages over existing shock absorbers. The acquisition brought with it substantial know-how in shock absorber manufacture. It was also known to shock absorber manufacturers that over the years Tenneco had acquired a sizeable Canadian chain of muffler installation shops through which it had sold and installed shock absorbers made by others. It could reasonably be anticipated that the chain would be expanded into the United States and used as a market for Tenneco's own manufactured shock absorbers. In addition, Tenneco had negotiated seriously with Armstrong Patents, Ltd., the largest manufacturer of shock absorbers in Britain, either for purchase of shock absorbers for resale in the United States or a license to manufacture domestically. In 1976, while negotiating for acquisition of Monroe, Tenneco manifested a clear interest in acquiring the DeCarbon Snock Absorber Company, a French firm manufacturing a type of gas pressurized shock absorber considered to be superior in some respects to conventional shock absorbers. Early in 1973 Tenneco had indicated an interest in acquiring Tropic Industries, a small company with a shock absorber prototype, and dropped the matter only because of insufficient patent protection. In short, it was known throughout the market that Tenneco was eager to get into the shock absorber business.[1]

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[1] Tenneco attempts to minimize its efforts at entry by pointing to the disadvantages posed by each: (1) that its negotiations with Armstrong died in July 1974 when the latter indicated that it was not for sale; (2) that negotiations through a broker for DeCarbon likewise failed because it set a selling price of 100 times earnings; and (3) that although it acquired the Teramatic patent with its purchase of Triple S, it did not allocate any of the purchase price to the patent. The records and findings of the ALJ, however, reveal other evidence from which continuing interest in a new entry by toe-hold acquisition may reasonably be inferred.

The ALJ found that Tenneco, following Armstrong's 1974 refusal to sell, nevertheless believed Armstrong might react differently if it received a specific offer above the price quoted on the exchange for its stock. Moreover, Tenneco instructed

(footnote continued)

Moreover, no **[361]** other firm had its capability and interest as a potential entrant when it acquired Monroe. Indeed, it was Monroe, aware of Tenneco's interest, that approached Tenneco.

The sole remaining element of a "perceived potential competition" case is a finding that the "edge" or "wings" effect of the perceived potential entrant, Tenneco, had a pro-competitive effect on the small group which presently controlled the market. There cannot be any question about the Commission's findings, based on undisputed evidence, that during the years prior to the acquisition of Monroe, when Tenneco was stepping up its efforts to enter the market, Maremont, the largest of the existing manufacturers of replacement shock absorbers, engaged in a burst of pro-competitive conduct. It improved its ability to fill orders by investing more heavily in inventory, thus increasing availability and speed of delivery of the many types of absorbers demanded by the purchasing market. It embarked on new-product development and research, introducing a new "air-oil" absorber, and moved into the market for McPherson strut replacement cartridges. It cut and absorbed manufacturing costs, which enabled it to reduce prices.

The Commission found that this pro-competitive activity on the part of Maremont could not be adequately explained by factors indigenous to the existing replacement shock absorber market, and it inferred from all of the circumstances that Maremont's conduct was at least in substantial part a response to Tenneco's standing at the edge of the market as a competent, efficient, and financially powerful potential competitor, which would enter the market unless it were discouraged because existing competitive pressure reduced the profit prospects. The majority rejects this finding as not supported by substantial evidence. I disagree.

In considering the issue of whether the presence of a powerful potential competitor at the edge of a concentrated market controlled by a few manufacturers has a pro-competitive edge effect upon them, the Supreme Court has recognized that it would be an extraordinary case where such an effect could be proved by direct evidence. The burden is satisfied by circumstantial evidence from which the trier of fact may draw a reasonable inference of causation. See *United States v. Falstaff Brewing Corp., supra,* 410 U.S. at 534-35 n. 13, 93 S.Ct. at 1101-1102 n. 13, where the Court stated:

> The Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the

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(*footnote continued from previous page*)

its European office to maintain contact with Armstrong. The ALJ further found that Tenneco "continued to maintain its interest in Armstrong through 1976." Tenneco acquired Monroe in 1976. Similarly, with respect to DeCarbon, the ALJ found that, although "the matter of price blocked a possible acquisition from the outset," Tenneco in November 1976, during its on-going negotiations with Monroe, instructed the broker who had brought the DeCarbon prospect to Tenneco, to "stay in contact with the situation."

With respect to its "Terramatic" patent acquired from Triple S, Tenneco as late as August 12, 1976, took steps to insure that the patent rights be preserved and shortly prior to its acquisition of Monroe indicated that it planned to use the Terramic design in the manufacture of steering dampers and to adapt it to other types of shock absorbers.

lifeblood of antitrust law, see *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 [89 S.Ct. 1562, 23 L.Ed.2d 129] (1969); *Interstate Circuit, Inc., v. United States*, 306 U.S. 208, 221 [59 S.Ct. 467, 472, 83 L.Ed. 610] (1939); *Frey & Son, Inc v. Cudahy Packing Co.*, 256 U.S. 208, 210 [41 S.Ct. 451, 65 L.Ed. 892] (1921), especially for § 7 which is concerned "with probabilities, not certainties," *Brown Shoe Co. v. United States*, 370 U.S., at 323 [82 S.Ct., at 1522]. As was stated in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174 [84 S.Ct. 1710, 1718, 12 L.Ed.2d 775] (1964), "[p]otential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer.'"

Nor was there any lack of circumstantial evidence of Falstaff's on-the-fringe competitive impact. As the record shows, Falstaff was in the relevant line of commerce, was admittedly interested in entering the Northeast, and had, among other ways, see n. 8, *supra*, made its interest known by prior-acquisition discussions. Moreover, there were, as my Brother Marshall would put it, objective economic facts as to Falstaff's capability to enter the New England market; and the same facts which he would have the District Court look to in determining whether the particular theory of potential **[362]** competition we do not reach has been violated, would be probative of violation of § 7 through loss of pro-competitive on-the-fringe influence. See *FTC v. Procter & Gamble Co., supra*, [386 U.S.] at 580-81 [87 S.Ct. at 1231-32]; *United States v. Penn-Olin Chemical Co., supra*, [378 U.S.] at 173-177 [84 S.Ct. at 1718-1720]; *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660 [84 S.Ct. 1044, 1049, 12 L.Ed.2d 12] (1964).

The Commission is not required, as the majority here apparently demands, to introduce "smoking gun" evidence to establish the element of causation. On the contrary, § 7 is concerned "with probabilities, not certainties," *Brown Shoe Co. v. United States*, 370 U.S. 294, 323, 82 S.Ct. 1502, 1522, 8 L.Ed.2d 510 (1962). It is sufficient therefore, to show a "*probability* that the acquiring firm prompted premerger pro-competitive effects within the target market by being perceived by the existing firms in that market as likely to enter," not a certainty. *United States v. Marine Bancorporation, Inc., supra*, 418 U.S. at 625, 94 S.Ct. at 2871 (emphasis added). Section 7 bars an acquisition where "the effect . . . *may* be substantially to lessen competition . . ." (emphasis added). Nor is it necessary to show that *all* pro-competitive activities in the market be attributed to the potential competitor's presence at the edge as long as some substantial lessening of competition is shown, even though partial. *Id.*

In determining whether the Commission's findings are supported by substantial evidence we may not substitute our inferences for those drawn by the Commission, providing its findings are rationally based. *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979). Nor may we reject the Commission's findings merely because there is an equally plausible inference or because we have doubts about the reasonableness of the inference and consider another to be equally or even more reasonable. See *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981). In short we are not the fact finders.

In the present case the majority in my view has violated these principles in rejecting the Commission's finding of pro-competitive edge effect. The majority, without any foundation in the record or elsewhere, concludes that the Commission "*ignored* evidence contrary to its hypothesis," and that "[w]e must *weigh* this evidence in our review of the substantiality of the record evidence," *supra,* p. 357 (emphasis added). The first statement flies in the face of the record and the second violates the well-established rule that we do not "weigh" the evidence. We merely determine whether there is substantial evidence in support of the Commission's findings.

The majority first faults the Commission's statement that the record does not reveal competitive pressure by Monroe or by the other existing manufacturers on Maremont that would cause it to engage in its competitive campaign prior to Tenneco's entry. The Commission's statement, however, is clearly correct. There was no evidence of financial weakness on the part of Maremont when it engaged in active pro-competitive activities during the years immediately prior to the Tenneco-Monroe merger. Although Gabriel had been in a weak condition when it was acquired by Maremont in 1962, the business had long since been strengthened and was thriving now that Maremont had become the largest producer of replacement shock absorbers, accounting for more than 46.1% of replacement sales in 1976. If Maremont ever had a "shaky position in the replacement shock absorber market," as the majority suggests, it was a decade earlier. In short, Maremont had made its heavy investment in Gabriel and through competition had captured the lion's share of the market so that it was no longer required to engage in competitive activity, as it had years earlier, to maintain its No. 1 position as against the three other leading shock absorber manufacturers.

The majority next concludes that the Commission erred in stating that Maremont would not have voluntarily cut its prices and profits in a concentrated market. The majority attributes this activity, without any evidentiary basis, to Maremont's need **[363]** to compete against Monroe and others rather than to its desire to forestall Tenneco's entry. Economic experience in an oligopolistic market is to the contrary. When, as here, four leading manufacturers possess what amounts to a collective monopoly in a business with high entry barriers, controlling 92% of the market sales, it is usually self-defeating for one to cut prices and profits, since the effect more often than not is to force the other three to do the same, leaving the market shares the same but profits reduced for all. 2 P. Areeda & D. Turner, *Antitrust Law* § 404b, at 273-74 (1978). This is what § 7 is all about.

> Nevertheless there is general agreement, . . . that an undue reduction in the number of competing sellers, or undue concentration of sales in the hands of a few relatively large sellers, is likely to lead to non-competitive pricing, either through recognized interdependence or actual collusion or both. Acceptance of that proposition brings one to the second key problem: neither economic theory nor empirical evidence specifies the minimum number of sellers normally necessary for effective price competition or the level of concentration among leading firms normally impeding it. However, there is a substantial concensus that independent pricing among sellers of a homogeneous product is likely to occur in a market with as few as 10 to 12 equivalent sellers or, unless the total number of firms is very small, with a four-firm concentration ratio below 55 or 60 percent. *When that ratio exceeds 75 or 80 percent, the*

> *danger of non-competitive pricing is likely to be very high.* 4 P. Areeda & D. Turner, *supra*, 908, at 27 (emphasis added).

Indeed, the majority's earlier finding (p. 11) that the market "was not genuinely competitive" is inconsistent with its later finding that Maremont's activity can "be explained by a need to compete against those already in the market," specifically citing Monroe. (Maj. Opin. p. 357).

The majority next asserts that the Commission erred in rejecting the following testimony of Byron O. Pond, Jr., Senior Vice-President and Director of Maremont:

> Q Did the presence of Walker, IPC or Midas and/or TRW as likely potential entrants into the shock absorber market, have any effect on Maremont's decisions, business decisions?
>
> A I don't think that we looked specifically at competitors on a periodic basis or potential competitors, in developing our strategy. I think we developed our strategy and approach to the business based on how we perceive it and how we perceived the opportunities . . . . (Maj. Opin. p. 358).

Pond's testimony is described by the majority as "direct evidence that Tenneco had no direct effect on Maremont's business decisions or competitive activity." *Id.* at 358. If this testimony stood alone it might support the majority's characterization, subject to its being discounted heavily by the Commission (as is its right) as the statement of an obviously biased member of the "Big Four," which had a great deal to gain by preventing a divestiture of Monroe that would put Tenneco back on the edge of the market, determined to enter as a new, fifth competitor rather than simply to succeed by acquisition of Monroe's share as one of the existing four.

> The inference drawn by the majority from Pond's testimony, however, is destroyed by the balance of his answer:
>
> A . . . We have long felt that the shock absorber business has been a very profitable and lucrative business and one that would be an enticing one to be in.
>
> * * * * * * *
>
> And our feeling has been that this has made the shock absorber business an attractive one. Our—the attractive nature of the shock absorber business has caused us to invest because of the opportunities *and also to invest because, if we didn't invest, someone else would.*
>
> * * * * * * *
>
> We maintain service levels higher than most other people do in the industry. Where very often the norm is 90 to 92 percent availability, we have invested **[364]** considerably more in inventory to provide service levels in the 98 and 99 percent range. We have made significant investments in research and development in bringing new products to the market, not only to help increase our share of the business, *but to make a less exciting or less desirable business for competitors to expand in.*
>
> * * * * * * *
>
> Q Did this potential have any effect on Maremont's costs or prices?
>
> A Well, it certainly had an impact on our costs. *One of the ways that you strengthen your position in a business and restrict or limit the amount of competition that you are faced with*

> *is to make considerable efforts to become a low-cost producer.* We have had as a company very aggressive cost-reduction programs over the past eight or nine years, but more specifically, over the past three to four years, to reduce the cost of our product, to reduce the cost of our every-day market products. (App. at 678-81)(emphasis added).

In my view it was not unreasonable for the Commission to interpret Pond's testimony when viewed against all of the surrounding circumstances, as an admission implying that Tenneco was the "someone else" who would invest if Maremont did not and that Maremont had pursued its "efforts to become a low-cost producer" in order to "restrict or limit the [potential] competition that [it] ... faced" from Tenneco. One would hardly expect Maremont, the largest manufacturer in a highly concentrated business—one of four controlling 92% of the market—to describe Tenneco by name as a reason for its own increased competitive efforts. An astute witness such as Pond, a top Maremont official, would recognize that in an antitrust suit based on lessening of perceived potential competition, testimony along such lines would increase the chances that Tenneco would be ordered to divest itself of Monroe, and that this in turn might result in Tenneco's later entering the market *de novo* or by toe-hold acquisition, increasing the competition heavily as compared with the *status quo* which would continue if Tenneco would remain simply as a successor to Monroe, the second largest manufacturer, accounting for 32.4% of replacement sales in 1976.

Regardless whether one agrees that Pond's testimony supports the Commission's finding, the interpretation most favorable to Tenneco would be that Pond's testimony, standing alone, is ambiguous, *not* that it negates any "edge effect" caused by Tenneco's potential entry. Not even the Administrative Law Judge went as far as the majority does here. He simply stated that the testimony was "unclear" because it "can be read to refer to potential competitors, or it can be read to refer to competitors presently in the market, or to both." Thus the majority errs in suggesting that the Commission's finding is contrary to credibility findings made by an administrative law judge "who has observed the witnesses," citing *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (holding that while the Board must consider an ALJ's findings it may reverse an ALJ even though his findings are not "clearly erroneous"). The ALJ's recommended decision here was not based on an appraisal of Mr. Pond's credibility but on his unwillingness to choose one of three plausible interpretations of Pond's testimony, each of which he recognized as reasonable. As the Supreme Court made clear in *Universal Camera Corp., supra,* the Commission, as the ultimate fact finder, was entitled, as long as it gave due consideration to the ALJ's findings, which it certainly did here, to choose one of these interpretations rather than reject the testimony entirely as "unclear." When one considers Pond's testimony against the strong and undisputed proof that Tenneco was viewed by Maremont and others in the concentrated market as a powerful potential competitor, the Commission's finding of edge effect is both rational and supported by substantial evidence.

For these reasons I dissent.

eration's finding of coercive effect is both reasonable and supported by substantial the evidence.

For these reasons I dissent.

UNITED STATES of AMERICA
v.
POTAMKIN CADILLAC CORPORATION*

No. 109, Docket 82-6053

United States Court of Appeals, Second Circuit
September 22, 1982

1. **Where appeal from the imposition of statutory forfeiture for failure to timely file required FTC report was "frivolous" because it was totally unsupported by evidence or the law, and utterly lacking in merit, double costs and $500 in attorney's fees would be assessed against defendant and its attorney jointly and severally.**

Defendant's appeal from grant of summary judgment in favor of United States in suit seeking imposition of statutory forfeiture for failure to file financial information form required by Federal Trade Commission was "frivolous," and therefore double costs and $500 in attorney's fees would be assessed against defendant and its lawyer, jointly and severally, where appeal was to[380]tally lacking in merit, framed with no relevant supporting law, conclusory in nature and utterly unsupported by evidence.

2. **Unsupported contention that defendant had filed FTC special report did not create a genuine issue of material fact necessary to preclude grant of summary judgment favoring government.**

On summary judgment motion of United States in suit seeking imposition of statutory forfeiture for failure to file financial information form required by Federal Trade Commission, defendant's unsupported assertion that it had filed report did not create genuine issue of material fact so as to preclude summary judgment.

3. **Conjecture by litigants or mere allegation in pleadings do not create a genuine issue for trial precluding summary judgment.**

Genuine issue for trial precluding summary judgment is not created by mere allegation in pleadings nor by surmise or conjecture on part of litigants.

The Government moved for summary judgment in its action seeking imposition of statutory forfeiture for failure to file a financial information form required by the Federal Trade Commission. The United States District Court for the Southern District of New York, Kevin Thomas Duffy, J., 533 F.Supp. 331, granted motion, and defendant appealed. The Court of Appeals held that: (1) defendant's unsupported assertion that it had filed report did not create genuine issue of material fact so as to preclude summary judgment, and (2) appeal was "frivolous" and therefore double costs and $500 in attorney's fees would be assessed against defendant and its lawyer, jointly and severally.

Judgment affirmed.

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*Reported in 689 F.2d 379 (1982); *cert. denied* May 20, 1983.

(*Syllabus, with substituted captions, taken from 689 F.2d. 379*)

Philip I. Beane, New York City, for defendant-appellant.

Jonathan A. Lindsey, Asst. U. S. Atty., Southern District of New York, New York City (John S. Martin, Jr., U.S. Atty., Southern District of New York, *Richard N. Papper,* Asst. U. S. Atty., New York City, of counsel), for plaintiff-appellee.

Before LUMBARD, CARDAMONE and WINTER, *Circuit Judges.*

PER CURIAM:

[1] Defendant-appellant Potamkin Cadillac Corporation ("Potamkin") appeals from a grant of summary judgment entered February 19, 1982 in the United States District Court for the Southern District of New York, 533 F.Supp. 331, (Duffy, *Judge*) which found Potamkin liable for failing to file a financial report pursuant to an order of the Federal Trade Commission ("FTC") in violation of 15 U.S.C. § 46(b) (1976)(Section 6 of the Federal Trade Commission Act) and assessed penalties of $100 for each day the report was not filed, 15 U.S.C. § 50 (1976) (Section 10 of the Federal Trade Commission Act), for a total of $39,100. Potamkin requests reversal of Judge Duffy's order and a remand to the District Court for a full evidentiary hearing, asserting that unresolved issues of fact remain. We find this contention utterly without legal merit. Indeed, we find this appeal frivolous within the meaning of Rule 38, Fed.R.App.P. and we assess jointly and severally against Potamkin and its lawyer, Philip I. Beane, Esquire, double costs and $500 in attorney's fees in favor of the Government.

The undisputed facts in this case show that Potamkin is a corporation engaged in interstate commerce; that on February 1, 1980 the FTC issued a special order directing Potamkin to file within 10 days of receipt an informational report covering the last quarter of 1979 on an FTC form attached to the order; that on February 11, 1980 the order was served on Potamkin by registered mail and service was acknowledged; that Potamkin did not move to quash or limit the order or to obtain an extension of time for filing; that the FTC issued a notice of default to Potamkin stating that the statutory penalty of $100 per day would start to run on April 12, 1980; that service of the default notice was acknowledged on March 11, 1980; that this action was brought on September 3, 1980; and that by letter of May 8, 1981 Potamkin sent a partial report to government counsel which was deemed an acceptable filing. The report thus was not filed for 391 days after the statutory penalty began running; of that period, approximately 248 days elapsed after the government's complaint in this case was filed.

[2] Throughout these proceedings, Potamkin has claimed that a timely filing was in fact made and the document was lost by the government; alter-

natively, that Potamkin was not required to file the report in the first place; that it had filed the report **[381]** upon receipt of the complaint; or that "all of the documents used in this matter by the government are not clear and concise, and are not readily understandable or decipherable." Potamkin's evidence that the report was filed is an affidavit sworn by its attorney, Philip I. Beane, who concededly lacks personal knowledge, that "[t]o the best of POTAMKIN's knowledge, the report was filed in a timely fashion." The supporting proof is best summed up by a letter from Beane to a government attorney which states, "I do not have the specifics of the filing, nor can I tell which employee filed it. . . . I have no cover sheet nor any other items. . . . There is nothing else that I can give you on this matter." On the government's motion for summary judgment, Judge Duffy properly ruled that Potamkin's unsupported assertion that it had filed the report did not create a genuine issue of material fact which might preclude summary judgment.

[3] Rule 56(e) of the Federal Rules of Civil Procedure states unequivocally that in order to defeat a motion for summary judgment, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." Such an issue is not created by a mere allegation in the pleadings, *Applegate v. Top Associates, Inc.*, 425 F.2d 92, 96 (2d Cir. 1970); *Korinis v. Sealand Services, Inc.*, 490 F.Supp. 418, 422 (S.D.N.Y.1980), nor by surmise or conjecture on the part of the litigants, *Nemo v. Allen*, 466 F.Supp. 192, 195 (S.D.N.Y.1979). As this Court has more recently stated in *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980):

> [T]he mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party. *See Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 187-188 (2d Cir. 1978), *cert. denied*, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 169 (1979). The litigant opposing summary judgment, therefore, 'may not rest upon mere conclusory allegations or denials' as a vehicle for obtaining a trial. *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). Rather, he must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful.

That Mr. Beane's unsupported assertions do not meet this standard must be as obvious to him as it is to us.

Potamkin's other legal defenses merit only the briefest of comments. FTC authority to require Potamkin to file the report is clearly laid under 15 U.S.C. § 46(b), which provides the Commission with the power to

> require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, . . . to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made

under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

Since Potamkin made no effort to clarify matters with the FTC, even after the warning letter, we agree with Judge Duffy that Potamkin's claim that government information requests were confusing is "almost an insult to our entire legal system." Memorandum and Order dated February 19, 1982 at 3.

Potamkin's appeal amounts to "little more than a continued abuse of process" which raises no "colorable legal or factual basis for the relief sought." *Muigai v. INS,* 682 F.2d 334 at 337 (2d Cir. 1982). It is totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evi[382]dence. It was, we believe, "brought without the slightest chance of success," *Bankers Trust Co. v. Publicker Industries, Inc.,* 641 F.2d 1361, 1367-68 (2d Cir. 1981), an imposition on the government which is forced to defend against the appeal and on the taxpayers who must pay for that defense. Accordingly we assess double costs and $500 in attorney's fees against Potamkin and its lawyer, Philip I, Beane, jointly and severally, since attorney and client are in the best position between them to determine who caused this appeal to be taken. *See* Fed.R.App.P. 38.

The judgment below is affirmed.

BROWN & WILLIAMSON TOBACCO CORP.
v.
FEDERAL TRADE COMMISSION*

No. C 82-0373-L(B) FTC File No. P81-4511

United States District Court, Western District of Kentucky
September 27, 1982

In an action in which cigarette manufacturer sought a preliminary injunction to enjoin FTC from publishing a proposed notice in the *Federal Register* concerning the possible inaccuracy of its method of measuring the "tar" and nicotine content of Barclay cigarettes, court denied plaintiff's motion and dismissed the complaint for lack of a reviewable "final agency action."

Before BALLANTINE, *District Judge.*

MEMORANDUM

This matter is before the Court on the motion of the plaintiff for a preliminary injunction. This action was filed June 25, 1982. On that date Circuit Judge Boyce F. Martin, Jr., sitting by designation, granted a temporary restraining order which restrained defendant, Federal Trade Commission (FTC), from:

1. Prohibiting Brown & Williamson from relying upon defendant's present cigarette testing methodology and upon the "tar" and nicotine figures for Barclay reported in the FTC "Tar" and Nicotine Report published by defendant in December, 1981 to substantiate Brown & Williamson's claim that Barclay is a 1 mg "tar," 0.2 mg nicotine cigarette.

2. Amending the FTC "Tar" and Nicotine Report published by defendant in December, 1981 as to plaintiff's Barclay cigarette;

3. Refusing to test Barclay for "tar" and nicotine by means of defendant's present testing methodology or to publish the results of such tests in future FTC "Tar" and Nicotine Reports.

Thereafter, on July 23, 1982, the Court heard oral arguments on plaintiff's motion for preliminary injunction and the matter now stands submitted on that motion.

Without extending this memorandum to an unreasonable length, it may be noted that as a result of negotiations between the FTC and the tobacco industry, cigarette manufacturers, including plaintiff, agreed to display on their cigarette packages the "tar" and nicotine content expressed in milligrams. This voluntary agreement led the FTC to conclude that there was no longer a need to adopt a Trade Regulation Rule requiring publication of "tar" and nicotine content of cigarettes.

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*Not otherwise reported.

The "tar" and nicotine content were to be determined by the use of a device which measured the substances in the smoke. This is known as the Cambridge Filter method which, for brevity, we will hereafter refer to as the FTC method.

No one contends that the FTC method in any way approximates the smoking habits of human beings. The test is designed to determine the relative amounts of "tar" and nicotine in various brands of cigarettes.

Recent public pronouncements by various agencies and organizations concerning the effects of cigarette smoking and, particularly, of "tar" and nicotine on the human system, led the six major manufacturers of cigarettes to try to develop cigarettes that are as low in "tar" and nicotine as possible, yet which retain a degree of taste that makes them marketable.

The Court is well aware that the cigarette industry is fiercely competitive and, thus, a cigarette that is significantly lower in "tar" and nicotine would be attractive to those smokers who are concerned about the health questions.

In January, 1981, plaintiff began to market a new brand of cigarettes called "Barclay." Barclays were fitted with an innovative filter which produced significantly less "tar" and nicotine than its competing low "tar" and nicotine brands. Barclay, by the FTC method, produced 1 mg. "tar" and 0.2 mg nicotine. An intensive advertising campaign by plaintiff led to Barclay's capturing a significant share of what is termed the ultra-low tar market. Barclay apparently gored the oxen of R. J. Reynolds and Phillip Morris, the two largest cigarette producers in America. They complained to the FTC asserting that the FTC method was an inaccurate device by which to measure the "tar" and nicotine content of Barclay cigarettes. R. J. Reynolds and Philip Morris suggested that tests which they had conducted indicated a substantially higher measurement of "tar" content and they requested the FTC to adopt a new measurement of testing.

Plaintiff urged the staff of the FTC to enter into negotiations to attempt to resolve the dispute among its, plaintiff's, data, and data submitted by R. J. Reynolds and Philip Morris and the data furnished the staff by consultants employed by the FTC. Nothing came from these urgings and the staff submitted to the FTC a report, the contents of which were withheld from plaintiff.

The FTC reached a determination that it would prohibit plaintiff from relying on the FTC method when advertising Barclays. This lawsuit followed.

Plaintiff advances the appealing argument that the decision of FTC to prohibit plaintiff's advertising the "tar" and nicotine as measured by the FTC method places plaintiff between Scylla and Charybdis. If plaintiff advertises without disclosing the "tar" and nicotine content, or if it persists in advertising its "tar" and nicotine content by use of the FTC method, it runs the risk of facing an enforcement action charging unfair or deceptive practices. The only other avenue is the elimination of all Barclay advertising, an even less appealing prospect.

In determining whether to grant injunctive relief the Court must look to the four tests articulated in *Mason County Medical Association v. Knebel,* 563 F.2d 256 (6th Cir. 1977):

> In determining on appeal whether the District Court abused its discretion in granting or withholding preliminary injunctive relief, this Court has set forth four standards which must be considered:
>
> 1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) Whether the plaintiffs have shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
>
> 4) Whether the public interest would be served by issuing a preliminary injunction.

563 F.2d at 261.

FTC proposed a Federal Register notice that would set forth its determination that the FTC method of measuring "tar" and nicotine was inaccurate so far as Barclay was concerned and therefore unacceptable. FTC further determined that a new test method was indicated based on the fact that independent consultants had concluded that Barclay's correct "tar" rating was from 3 mgs. to 7 mgs. FTC further proposed amending its December, 1981 report of comparative "tar" and nicotine ratings of various cigarettes by adding the Federal Register notice as an addendum, thereby effectually deleting Barclay's ratings. The proposed notice also took aim at two other brands manufactured by plaintiff which used the same filter as Barclay. The relevant portions of the notice concluded with a request for comments on three proposed modifications to the FTC method and for comments on the desirability of an even broader examination of the FTC method.[1]

It is the substance of this proposed publication that is the subject of the temporary restraining order.

The threshold question before the Court is whether the restrained publication is "agency action" as that term is used in Title 5 U.S.C. Section 702. Engrafted onto that question is whether plaintiff will suffer a legal wrong or is adversely affected or aggrieved within the meaning of a relevant statute.

If the proposed publication is not final agency action, judicial consideration of plaintiff's claim is forbidden. *Dairymen, Inc. v. FTC,* 684 F.2d 376 (6th Cir. 1982). *See also, First National Monetary v. Commodity Futures Trading,* 677 F.2d 522 (6th Cir. 1982). In *FTC v. Standard Oil of California* (Socal), 449 U.S. 232, 101 S.Ct. 488 (1980), the Court, in considering the question of finality of agency action and prior judicial intervention observed:

> Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. (Citation omitted.) Intervention also leads to piecemeal

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[1] The Court's inquiry into this matter has been hampered by the fact that FTC apparently purchased six 3-ring, looseleaf binders from the low bidder. Attempts to remove the binders from the box in which they were delivered to the Court invariably resulted in most of the documents falling in a disorderly heap in the bottom of the box.

> review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.*** Finally, every respondent to a Commission complaint could make the claim that Socal had made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes. 449 U.S. at 242-243, 101 S.Ct. at 494.

Paraphrasing the *Socal* court, we conclude that FTC's proposed publication in the Federal Register is not a definitive ruling or regulation. It has no legal force or practical effect on plaintiff's daily business other than the disruptions that accompany any major litigation. Immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations counsel against the conclusion that the proposed publication is final agency action.

In view of our conclusion we must determine that plaintiff cannot satisfy the first test of *Mason County Medical Association, supra,* and the Court's ultimate determination is that it is without jurisdiction to review the proposed action.

The foregoing discussion constitutes the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a).

The temporary restraining order will be dissolved, the motion for preliminary injunction will be denied, and this action will be dismissed.

An appropriate Order has been entered this 27th day of September, 1982.

ORDER

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED:

(1) The temporary restraining order entered June 25, 1982, be and it hereby is dissolved;

(2) Plaintiff's motion for preliminary injunction be and it hereby is denied;

(3) This action be and it hereby is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 27th day of September, 1982.

BROWN & WILLIAMSON TOBACCO CORP.
v.
FEDERAL TRADE COMMISSION, et al.*

No. C 82-0373-L(B) FTC File No. P81-4511

United States District Court, Western District of Kentucky
September 27, 1982

Following denial of cigarette manufacturer's motion for a preliminary injunction enjoining FTC from publishing a notice in the *Federal Register* concerning the possible inaccuracy of its "tar" and nicotine figures for Barclay cigarettes, and dismissal of the complaint for lack of a reviewable "final agency action," court granted plaintiff's motion for an injunction requiring FTC to maintain the status quo pending appeal of the dismissal order. Court found that requested relief would not significantly harm other parties or the public interest, and was necessary to prevent plaintiff from suffering immediate and irreparable injury before the appeal had been heard and determined.

Before BALLANTINE, *District Judge.*

ORDER

Plaintiff having moved for an order, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, for an injunction pending the hearing and determination of an appeal to the United States Court of Appeals for the Sixth Circuit from an order of this Court entered herein on September 27, 1982, denying plaintiff's motion for a preliminary injunction, and the Court having considered such motion and having heard arguments of counsel, and having found that such relief is necessary in order to preserve the status quo pending appeal and to prevent the occurrence of immediate and irreparable injury to plaintiff before the appeal may be heard and determined, that no substantial harm to other parties will result from such relief, and that such relief will not harm the public interest, it is

ORDERED, that said motion be and it hereby is granted; and it is

FURTHER ORDERED that, pending the hearing and determination of plaintiff's appeal from the aforementioned order of this Court, defendant Federal Trade Commission, its officers, agents, servants and employees, and any persons acting in concert with them, be and hereby are enjoined and restrained from

1. Prohibiting plaintiff from relying upon defendant's present cigarette testing methodology and upon the "tar" and nicotine figures for plaintiff's Barclay cigarette as reported in defendant's December, 1981 *Report on "Tar" and Nicotine Content of the Smoke of 200 Varieties of Cigarettes*

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*Not otherwise reported.

("FTC 'Tar' and Nicotine Report") to substantiate Brown & Williamson's claim that Barclay is a 1 mg "tar", 0.2 mg nicotine cigarette;

2. Amending the FTC "Tar" and Nicotine Report published by defendant in December, 1981 as to plaintiff's Barclay cigarette;

3. Refusing to test Barclay for "tar" and nicotine by means of defendant's present testing methodology or to publish the results of such tests in future FTC "Tar" and Nicotine Reports; and

4. Publishing in the Federal Register any notice of alterations in or proposals to alter defendant's present cigarette testing or reporting program.

5. All provisions of the Court's Order of July 27, 1982, directing the Clerk to seal the exhibits tendered and the administrative record of the FTC remain in full force and effect.

AUTOMOBILE IMPORTERS OF AMERICA, INC.
v.
FEDERAL TRADE COMMISSION*

Civ. A. No. 81-3205

United States District Court, District of Columbia
September 28, 1982

In an FOIA action, a trade association of automobile importers and manufacturers sought access to two documents withheld by FTC under the attorney work-product and investigative records exemptions to the FOIA. After considering memorandum of the parties, together with supporting affidavits and the index submitted by the FTC, court held that except for a portion of one of the documents, the Commission had properly invoked the attorney work-product and investigative records exemptions. Although plaintiff correctly asserted that the work-product privilege generally expires with the conclusion of litigation, the documents in this instance were shown to be relevant to FTC's ongoing auto defects enforcement program, since they appear to have broad applicability within context of the program as an enforcement theory and litigation device. The documents also fall within the investigative records exemption because they assess potential remedies and their disclosure would likely interfere with FTC's investigations. Court therefore concluded that, with the exception of one page, FTC properly withheld the documents from disclosure and was entitled to summary judgment in its favor.

Before PARKER, *District Judge.*

Milton D. Andrews and *Dennis A. Adelson* of *Rivkin, Sherman and Levy,* Washington, D.C., for plaintiff.

Judith Bartnoff, Asst. U.S. Atty., Washington, D.C., for defendant.

MEMORANDUM OPINION

The issue presented in this Freedom of Information Act (FOIA) proceeding is whether two agency documents relating to the defendant Federal Trade Commission's (FTC) policy regarding enforcement of auto defects claims have been properly withheld from the plaintiff Automobile Importers of America, Inc., under either the deliberative process and attorney work-product exemption or the law enforcement investigatory records exemption, 5 U.S.C. §§ 552(b)(5) and (b)(7)(A). The matter is presented on cross-motions for summary judgment. The Court has considered the memoranda of the parties together with the supporting affidavits[1] and the index submitted by the FTC and concludes that, with the exception of a portion of one document, the work-product and investigative records exemptions to to the FOIA have been properly invoked by the FTC and the documents are exempt from disclosure.

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*Reported in Trade Reg. Rep. ¶ 65,005 at 70,596 (1982-83 Trade Cases).

[1] Affidavit of FTC Cleveland Regional Office staff attorney Richard H. Gately (March 11, 1982) (supervised the writing of the Holahan Memorandum); Affidavit of FTC Dallas Regional Office Assistant Regional Director Eddie Correia (March 11, 1982) (author of the Correia memorandum).

Background

The facts material to this case are undisputed. Automobile Importers, a trade association comprised of importers and manufacturers of automobiles and automotive equipment, filed an FOIA request with the FTC on April 27, 1981. It requested access to two documents: "Memorandum on the FTC-Ford Settlement" by William A. Holahan and "Prospective Remedies in Auto Defect Cases" by Eddie Correia. The two documents relate to FTC auto defects enforcement with specific reference to certain aspects of a proceeding against the Ford Motor Company. The FTC denied the request, asserting exemption (b)(7)(A). Plaintiff's subsequent administrative appeal and motion for reconsideration proved unsuccessful. In denying the appeal, the FTC also concluded that the documents were exempt under (b)(5). Plaintiff then sought judicial relief in this proceeding on December 30, 1981.

The Holahan memorandum consists of two related documents prepared by an FTC economic consultant, assessing possible remedies in an agency action against the Ford Motor Company on the one hand and General Motors Corporation on the other. The discussion of the General Motors proceeding was prepared as an addendum to the Ford analysis. The Correia memorandum was prepared by an FTC staff attorney and examines the merits of possible remedies in automobile defect cases. The detailed index submitted by the government describes the contents of both memoranda and amply demonstrates that, in each instance, the documents focus upon the merits of available remedies or theories of enforcement. The only exception appears on page 3 of the index which indicates that in the Holahan addendum, the author included a one-page outline summarizing arguments against settlement presented by an enforcement target. See Index to Documents at ¶ 1(b)(2) (March 11, 1982).

Discussion

In support of summary judgment, Automobile Importers argues that the FTC has failed to carry its burden of demonstrating that the documents are exempt from disclosure. At the outset plaintiff asserts that the defendant's (b)(5) claim is not properly before the Court because the FTC failed to timely assert it in the initial denial of the FOIA request. As to the merits of the two exemption claims, plaintiff contends that the documents are not embraced within (b)(5) because their descriptions in the government affidavits and index suggest that they are neither predecisional policy formulations nor attorney work-product. Plaintiff claims that (b)(7)(A) does not apply because the memoranda, dealing only with analysis of potential remedies in auto defect cases, are not investigative records within the meaning of the statute. In addition, plaintiff questions whether release of the documents could possibly disrupt the FTC's investigative efforts.

1. The (b)(5) Claim

Although there is some merit to plaintiff's claim that the FTC's delayed administrative response to the FOIA request is harmful, the Court cannot, as plaintiff argues, dismiss the agency's (b)(5) claim solely on that ground. Plaintiff claims that the defendant violated its administrative due process rights by raising an additional and new exemption at a later point in the administrative process rather than in its initial denial of plaintiff's FOIA request.[2] Yet it is clear that plaintiff's proposed dismissal of the (b)(5) claim is inappropriate where, as is the case here, plaintiff was afforded an opportunity to brief the issue at the agency level in its reconsideration motion and, more importantly, in its extensive treatment of the issue in this proceeding on de novo review. The government's conduct does call into question the accuracy of its affidavits and, because of this, the Court has examined them with an especially critical eye.

Exemption (b)(5) precludes release of agency material which may be characterized as predecisional in the sense that it constitutes an integral component in the policy formulation process. The exemption is designed to maintain the integrity of an agency's deliberative process and it therefore embraces "subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); accord, *Brinton v. Department of State*, 636 F. 2d 600 (D.C. Cir. 1980). Application of the exemption requires a showing that the material was developed in order to facilitate the making of agency policy decisions.

Although both of the documents contain advice, it is not clear on the basis of the government affidavits the memoranda were composed or used to make a policy decision. Rather, it appears from a review of the government's *Vaughn* index that the memoranda represent an effort by the FTC to set forth a flexible set of agency options and considerations in the context of potential remedial scenarios for application in its auto defects enforcement actions. In sum, the documents do not seem to be predecisional components in the deliberative process sense, yet they suggest an agency effort to anticipate and prejudge options involving possible remedies as a guide for investigation and enforcement of its auto defects cases.

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[2] Plaintiff contends that the practice violates the FTCs statutory duty to "determine within ten days . . . whether to comply with [the FOIA] request and . . . immediately notify the person making such request of such determination *and the reasons therefore*. . . ." 5 U.S.C. § 552(a)(6)(A)(i) (emphasis supplied).

Attorney Work-Product

However, exemption (b(5) also precludes agency disclosure of material which constitutes attorney work-product. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Mervin v. FTC,* 591 F.2d 821, 825 (D.C. Cir. 1978). Consistent with the rule of *Hickman v. Taylor,* 329 U.S. 495 (1943), the exemption embraces documents setting forth the mental impressions or legal theories of attorneys during the course of or in anticipation of litigation. *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 865 (D.C. Cir. 1980).

Plaintiff argues that the documents are not protected by the work-product exemption because application of the privilege in this instance, where the documents relate to closed and open proceedings, would contradict the limits typically imposed upon the scope of the exemption. The plaintiff correctly asserts that the privilege generally expires with the conclusion of litigation, however, the government has shown that the documents in this case are relevant to the FTC's enforcement program. Given the ongoing nature of the program, discussions of potential remedies in auto defect proceedings clearly present agency litigation strategy in each individual case notwithstanding the fact that a particular memorandum may have originated as part of an isolated proceeding. An examination of the *Vaughn* index, which describes the two documents in detail, compels the conclusion that their value to the agency as an enforcement theory and litigation device has broad applicability within the context of the FTC's auto defect program.

2. *The (b)(7)(A) Claim*

The FTC possesses statutory authority to investigate, regulate and enforce national policies concerning competitive trade practices under 15 U.S.C. §§ 41 *et seq.* FOIA exemption (b)(7)(A) applies to the records compiled by the FTC in such proceedings. The agency is presently engaged in auto defects investigations and related enforcement actions. Thus, the dispositive issues before the Court are whether the two documents are indeed investigatory records for purposes of the exemption and whether their release would undermine the FTC's enforcement proceedings. The FTC has demonstrated through its affidavits and the descriptive index that the documents fit within the investigative records exemption, since they constitute an integral part of the agency's current investigations of auto manufacturers. Moreover, the FTC has shown that because of the nature of the documents — insofar as they assess potential remedies — their disclosure will likely interfere with its investigations.

The gravaman of plaintiff's (b)(7)(A) claim is that the FTC, in focusing on the potential harm which could flow to its investigations upon disclosure, has failed to show that the documents are indeed investigatory records compiled for law enforcement purposes. Plaintiff contends that the exemption encompasses only those documents which contribute to an investigative inquiry. Thus, plaintiff argues that agency "think pieces", pertaining only to settlement and remedies in its enforcement proceedings, necessarily fall outside the scope of the investigative records category. See *Hunt v. CFTC,* 484 F. Supp. 47 (D.D.C. 1979)(the records should be part of an inquiry into a statutory violation). Furthermore, plaintiff contends that disclosure of an agency evaluation of potential remedies in auto defects cases — one closed, others pending or anticipated — would be unlikely to interfere with FTC investigations or prosecutions.

In *NLRB v. Robbins Tire and Rubber Co.,* 437 U.S. 214 (1978), the Supreme Court considered the scope of the exemption in the context of an agency decision to withhold certain witness statements and noted:

> In originally enacting Exemption 7, Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases. Foremost among the purposes of this Exemption was to prevent "harm [to] the Government's case in court" . . . by not allowing litigants "earlier or greater access" to agency investigatory files than they would otherwise have. . . .

Id at 224-25 (citations omitted). While the investigative records exemption should be read narrowly, it clearly applies to material assembled in connection with an investigation or ensuing enforcement proceeding where the material is so intertwined with the agency's pursuit of the matter that disclosure would reveal its enforcement strategy. In *Robbins Tire* the Court found such a nexus with NLRB witness statements, recognizing that disclosure of the statements would enlighten enforcement targets in the conduct of their activities during both the investigation and the prosecution stages. The Court concluded the corresponding detriment to the government outweighed the presumption favoring disclosure embodied in the FOIA. *Id* at 241; accord, *Title Guarantee Co. v. NLRB,* 534 F.2d 484, 491 (2d Cir.), cert. denied, 429 U.S. 834 (1976) (recognizing two forms of harm: early discovery of the government's theory of enforcement and the chilling effect upon potential sources of investigative information.)[3]

The defendant FTC has shown in its supporting memorandum and descriptive index that both documents discuss remedies in FTC auto defect proceedings. Although some of the enforcement proceedings have concluded, the FTC represents that others are in progress. See Gately affidavit at ¶ 17; Correia Affidavit at ¶ 4. Accordingly, copies of the Correia memorandum, for example, have been given only limited circulation among agency officials conducting such proceedings. Correia affidavit at ¶ 5. Given that the ultimate objective of the FTC proceedings presumably is to implement proper remedial measures, revelation of such information could yield the very advantage to plaintiff's member companies coupled with a resulting potential for frustration of the government's proceedings which the Court described in support of exempting the material in *Robbins Tire.*

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[3] See also, *Hunt v. CFTC,* 484 F.Supp. 47, 50 (disclosure would have revealed course of investigation and litigation theories); *National Public Radio v. Bell,* 431 F.Supp. 509, 514-15 (D.D.C. 1977) (records for prospective law enforcement investigation properly withheld because release would have revealed agency's enforcement theory).

With the exception of the one page summary of the manufacturer's arguments against settlement contained in the Holahan addendum, the defendant FTC has properly withheld the memoranda from disclosure pursuant to exemptions (b)(5) and (b)(7)(A) and is entitled to summary judgment in its favor.

CONSUMERS UNION OF U.S., INC., et al.
v.
FEDERAL TRADE COMMISSION, et al.*

No. 82-1737 TRR No. 215-54

United States Court of Appeals, District of Columbia Circuit
October 22, 1982

1. **Injury described in consumer groups' complaint, and connection between plaintiffs and injury was sufficient to satisfy Article III threshold standing requirement.**

Where one of two consumer organizations participated in Federal Trade Commission's used car rule-making proceedings, and both spoke on behalf of used car purchasers seeking disclosures that would assist them in making informed purchasing decisions, and both organizations asserted that "but for" intervention of legislative veto, Federal Trade Commission's used car rule would have secured significant assistance and protection for used car buyers, consumer organizations had standing to challenge legislative veto.

2. **Where House and Senate had expounded on constitutionality of legislative veto and had not moved to dismiss complaint, case met requirement of adversary contest.**

Where House and Senate, as named defendants, vigorously aired their position on constitutionality of congressional veto, and did not seek dismissal of complaint against them brought by consumer organizations challenging congressional veto in relation to Federal Trade Commission rule on used car sales, case met requirement of adversary contest.

3. **Legislative veto provisions in Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 violate the constitutional principles of separation of powers.**

Section of Federal Trade Commission Improvements Act which required Federal Trade Commission, after promulgating any final rule, to subject such rule to Congress for review, by providing for congressional veto, violated principles of separation of powers and procedures established for exercise of legislative powers.

The United States District Court for the District of Columbia, John Garrett Penn, J., certified three questions concerning constitutionality of section of Federal Trade Commission Improvements Act which required Federal Trade Commission, after promulgating any final rule, to submit such rules of Congress for review, and thereby, in effect gave Congress veto power over rule. The Court of Appeals held that section violated principles of separation of power and procedures established for exercise of legislative powers.

Remanded.

(Syllabus, with substituted captions, taken from 691 F.2d 575)

***Reported in 691 F.2d 575 (1982); *aff'd sub nom., Process Gas Consumers Group, et al. v. Consumer Energy Council of America, et al.,* _____ U.S. _____, 103 S.Ct. 3556 (1983).**

J. Paul McGrath, Asst. Atty. Gen., Dept. of Justice, Washington, D.C., with whom *Stanley S. Harris,* U.S. Atty., *Anthony J. Steinmeyer* and *Douglas Letter,* Attys., Dept. of Justice, Washington, D.C., were on the brief for F.T.C.

Ellen Broadman, Washington, D.C., with whom *Mark Silbergeld* and *Alan B. Morrison,* Washington, D.C., were on the brief for Consumers Union of United States, Inc., et al.

Stanley M. Brand, Gen. Counsel to the Clerk, U.S. House of Representatives, Washington, D.C., with whom *Steven R. Ross,* Deputy Counsel to the Clerk, U.S. House of Representatives and *Eugene Gressman* Washington, D.C., were on the brief for U.S. House of Representatives.

*Charles Tiefer,** Asst. Senate Legal Counsel, U.S. Senate, Washington, D.C. with [576] whom *Michael Davidson,* Senate Legal Counsel, *M. Elizabeth Culbreth,* Deputy Senate Legal Counsel, U.S. Senate, Washington, D.C., were on the brief for U.S. Senate.

Robert C. Eckhardt and *Herman Schwartz,* Washington, D.C., were on the brief, for Waxman, et al., amici curiae urging unconstitutionality of the veto.

William H. Mellor, III, and *Maxwell A. Miller,* Denver, Colo., were on the brief for Mountain States Legal Foundation, et al., amici curiae urging constitutionality of the veto.

Walter E. Huizenga, Oakton, Va., was on the brief for National Auto. Dealers Ass'n, amicus curiae urging constitutionality of the veto.

Before ROBINSON, *Chief Judge,* and WRIGHT, TAMM, MACKINNON, WILKEY, EDWARDS, GINSBURG and BORK, *Circuit Judges.*

Opinion PER CURIAM.

PER CURIAM.

This case involves three questions certified to us by the District Court pursuant to Section 21(f)(1) of the Federal Trade Commission Improvements Act of 1980 (FTCIA).[1] All three questions concern the constitutionality of Section 21(a) of that Act, which requires the Federal Trade Commission (FTC), after promulgating any final rule, to submit such rule to Congress for review. The rule becomes effective after ninety days of continuous session following submission unless both Houses of Congress adopt a concurrent resolution disapproving the final rule.

In August of 1981 the FTC, after several years of rulemaking proceeding announced a final FTC rule covering representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars.[2] The used car rule was submitted to each House of Congress on

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*Pursuant to Title 2 U.S.C. § 2881(b).

[1] 15 U.S.C. § 57a-1(a) (Supp. IV 1980).

[2] 46 Fed.Reg. 41328-78 (1981).

9 September 1981.[3] Congress, by means of Senate Concurrent Resolution 60, proceeded to veto the rule.[4]

Following Congress' veto, plaintiffs, two consumer groups, filed this suit, naming as defendants the FTC, the Senate and the House of Representatives. The plaintiffs alleged that their members would be directly harmed by the legislative veto and the consequent failure of the FTC to make the used car rule effective. As required by the Act, the District Court immediately certified the constitutionality of the congressional action to this court for expeditious *en banc* consideration.

We are obliged at the outset to consider whether the matter before us meets the standing requirements of Article III. We hold that it does.

[1] FTCIA authorizes "[a]ny interested party" to file an action challenging the statute's congressional veto provisions.[5] It is undisputed that Congress through the "[a]ny interested party" specification, intended to permit standing to seek judicial review to the full extent permitted by Article III. One of the two plaintiff organizations, Consumers Union, participated in the FTC's used car rulemaking proceedings,[6] and both speak on behalf of consumers, in this instance, used car purchasers, who seek **[577]** disclosures that would assist them in making informed purchasing decisions. Both organizations assert that, "but for" the veto's intervention, the FTC's used car rule would have secured significant assistance and protection for the used car buyers they represent.[7] Guided most clearly by the Supreme Court's decision in *Buckley v. Valeo,*[8] we conclude that the injury described in the consumer organizations' complaint satisfies the Article III threshold standing requirement.[9]

[2] We further conclude that the case meets the Article III adversary contest requirement. The House and Senate, as named defendants, have

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[3] Because of the technicalities of the continuous session requirement, the rule was resubmitted on 28 January 1982.

[4] The Senate passed the veto resolution on 18 May 1982. 128 Cong.Rec. S 5402 (daily ed.). The House of Representatives followed suit on 26 May 1982. 128 Cong.Rec. H. 2883 (daily ed.).

[5] 15 U.S.C. § 57a-1(f)(1) (Supp. IV 1980). *Cf.* 15 U.S.C. § 57a(e)(1)(A) (1976) ("any interested person (including a consumer or consumer organization") may file a petition for judicial review of an FTC rule).

[6] *See* H.CONF.REP.No. 917, 96th Cong., 2d Sess. 38 (1980), U.S.Code Cong. & Admin.News, p. 1073 ("interested party" within the meaning of 15 U.S.C. § 57a-1(f)(1) includes, *inter alia,* "all persons who participated in the particular rulemaking that is the subject of the suit").

[7] *See Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72-78, 98 S.Ct. 2620, 2629-33, 57 L.Ed.2d 595 (1978).

[8] 424 U.S. 1, 11-12, 109-43, 96 S.Ct. 612, 630-31, 677-693, 46 L.Ed.2d 659 (1976). In *Buckley,* under 2 U.S.C. § 437h (1976), a judicial review provision similar to 15 U.S.C. § 57a-1(f)(1), voters and candidates successfully challenged as inconsonant with the Appointments Clause statutory provisions concerning House and Senate appointment of members of the Federal Elections Commission. The "injury" supporting standing was less apparent in that case than in this one.

[9] Last term, in *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, _____, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), the Supreme Court explained that Article III requires, "at an irreducible minimum," that the claimed injury not only be sufficient in itself, but also sufficiently connected to plaintiff, to defendant's actions, and to the action requested of the court. That is, there must be injury in fact, a connection between the injury claimed and the plaintiff. Second, the injury must be fairly traceable to defendant's actions, a connection between the injury and defendant's actions. And third, there must be a likelihood that the injury will be redressed by a favorable decision, a connection between the injury and the action requested of the court. All three requirements are met here. Members of the two consumer organizations are handicapped in their efforts to make informed used car purchases by the lack of a disclosure rule. Congress' veto, and the FTC's decision to abide by it, prevented the used car rule from taking effect. Finally, this court's decision, that the veto was unconstitutional, will clear the way for the rule to become effective.

vigorously aired their position on the constitutionality of the congressional veto, and have not sought dismissal of the complaint against them. The Resolution authorizing the Senate Legal Counsel to defend this case underscores the extraordinary character of the proceeding.[10] As the Senate Resolution points out, "ordinarily [a chamber of Congress] may not be named as a party defendant in litigation."[11] In this exceptional situation, however, the Senate and House, in enacting 15 U.S.C. § 57a-1(f)(l), and participating here as parties, have supplied the requisite adverseness and have effectively invited our expeditious resolution of the constitutional questions at issue.[12]

We are called upon then to decide whether Section 21(a) of FTCIA and Senate Concurrent Resolution 60(a) violate the principles of separation of powers established in Articles I, II, and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power.

[3] We note that all three of these questions have been thoroughly considered and disposed of by a panel of this court in *Consumers Energy Council of America v. FERC.*[13] We adhere to the analysis of that opinion. Accordingly, we hold:

1. For the reasons given in *Consumers Energy Council,* section V(E), Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 violate the principles of separation of powers established in Articles I, II, and III of the Constitution. [578]
2. For the reasons given in *Consumers Energy Council,* section V(D), Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 violate the procedures established by Article I for the exercise of legislative powers.
3. For the reasons stated in *Consumers Energy Council,* section V, note 82, we decline to express an opinion as to whether Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 improperly delegate administrative power to Congress without any standards for the exercise of that power.

For further proceedings in light of these holdings, the case is *Remanded.*

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[10] S. Res. 421, 97th Cong., 2d Sess. (1982), *adopted,* 128 Cong.Rec. S 7613 (daily ed. 29 June 1982).

[11] *Id.*

[12] *Cf. Chadha v. Immigration and Naturalization Service,* 634 F.2d 408, 419-20 (9th Cir. 1980), *restored to calendar for reargument,* 454 U.S. 812, 102 S.Ct. 87, 70 L.Ed.2d 80 (1982).

[13] 673 F.2d 425 (D.C.Cir. 1982), *appeal docketed,* 51 U.S.L.W. 3099 (U.S. 2 Aug. 1982) (No. 82-177).

FEDERAL TRADE COMMISSION
v.
H.N. SINGER, INC., d/b/a HOT BOX PRODUCTS, d/b/a H.N. SINGER CO., et al.*

No. C-80-3068 FTC File No. 802 3147

United States District Court, Northern District of California
October 26, 1982

In an FTC action seeking permanent injunctive and restitutionary relief against a sales manager for allegedly engaging in deceptive acts and practices in the sale of frozen pizza franchises, Court denied defendant's motion for withdrawal of admissions because of his "wholesale failure to admit, deny or object in proper fashion to the requests for admissions." Court held that such withdrawal would substantially prejudice FTC who had heavily relied on the admissions to support its motion for partial summary judgment. Since Commission has repeatedly declared unfair and deceptive certain specific representations in the context of franchising and business opportunities, Court found that this was a "proper case" in which to seek a permanent injunction, and noted that this action involving an individual defendant is a continuation of the *Singer* case, which the Ninth Circuit has already determined to be a "proper case." Court further found that sales manager was liable for the deceptive acts of his subordinates, since admissions establish his knowledge of, and authority to control the deceptive practices of his sales personnel. Demand for a jury trial was denied as untimely. Motion for continuance of trial date until completion of pending criminal proceedings was also denied, where declaration supporting motion was found to be fatally defective, and request as presented would essentially be a stay of years—not weeks or months. Court granted FTC's motion for partial summary judgment holding that the substantial prejudice which FTC and third-party investors would suffer from a stay outweighed the interest of defendant in testifying at his civil trial.

MEMORANDUM AND ORDER

PECKHAM, *District Judge:* Plaintiff Federal Trade Commission brings this action for permanent injunctive and restitutionary relief against defendant Michael Quinlan, alleging violations of Section 5(a) of the FTCA, 15 U.S.C. § 45(a), in connection with the sale of frozen pizza "distributorships" which were consummated by means of allegedly deceptive acts or practices. Defendant's liability is premised upon those acts or practices which were perpetrated during his employment as Sales Manager of the corporate defendant, H.N. Singer, Inc., d/b/a Hot Box Products. Numerous motions are pending before the court:

1) Defendant's Motion for Withdrawal of Admissions
2) Plaintiff's Motion to Strike defendant's declarations
3) Plaintiff's Motion for Partial Summary Judgment
4) Defendant's Motion for Jury Trial
5) Defendant's Motion for Continuance of Trial

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*Reported in Trade Reg. Rep. ¶ 65,011 at 70,611 (1982-83 Trade Cases).

I. *Defendant's Motion for Withdrawal of Admissions*

Defendant requests the court to grant his Motion to Withdraw Admissions pursuant to Rule 36(b), F.R.Civ.P., which provides in part:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. . . .

The language of 36(b) is permissive, vesting broad discretion in the district court.

Defendant claims obscurely that withdrawal in the instant case will "result" in a trial on the merits. "Result," however, does not denote "subserve." Defendant concedes that the deemed admissions will cover every allegation of plaintiff and, if not withdrawn, will result in liability to defendant of a maximum of $365,000 without permitting him to defend on the merits, thus resulting in great prejudice to him. He states that the admissions were deemed admitted despite his good-faith assertion of fifth amendment privilege and lack of adequate knowledge, the former having been premised upon a belief that a parallel criminal action in Chicago created self-incrimination problems.

Defendant thus contends, by implication, that the presentation of the merits would not be subserved if deemed admissions relating to ultimate facts are sustained. To support his position, he relies upon *Westmoreland v. Triumph Motorcycle Corp.*, 71 F.R.D. 192 (D. Conn. 1976), wherein the court permitted withdrawal of admissions previously deemed admitted because to uphold the admissions would virtually eliminate any presentation of the merits. The court found that plaintiff would not be prejudiced, in part because an essential witness had been found and could testify.

However, the holding in *Westmoreland* has been contradicted by numerous cases in which summary judgment has been granted or affirmed, based in whole or in part on admissions relating to dispositive facts which were obtained under Rule 36. See e.g., *Rainbolt v. Johnson,* 669 F.2d 767 (D.C.Cir. 1981); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *Luick v. Graybar Electric Co., Inc.*, 473 F.2d 1360 (8th Cir. 1973); *O'Campo v. Hardisty,* 262 F.2d 621 (9th Cir. 1958).

Defendant relies further upon *Pickens v. Equitable Life Assurance Soc.*, 413 F.2d 1390 (5th Cir. 1969), wherein the court stated that Rule 36(a) was intended as a device for narrowing the triable issues and not a way to avoid trial on the merits by deeming crucial and central facts to be admitted. Plaintiff argues that *Pickens* is clearly distinguishable from the facts herein.

In *Pickens, supra,* the court noted that the specific admission in question was the result of the "inattentive neglect" of the party to object or deny the request. The court accepted the explanation that the failure to respond was an "inadvertent omission," noting that all other requests had been admitted or denied. *Id.* at 1393. Additionally, there were four separate explicit denials of four other specific requests, directly contradicting the admission which was the result of inattentive neglect and thereby negating the likelihood that the admission was detrimentally relied upon.

In this case, defendant's wholesale failure to admit, deny or object in proper fashion to the requests for admissions differs significantly from the single instance of "inattentive neglect" found in *Pickens.* Moreover, plaintiff asserts that it has indeed detrimentally relied on the defendant's admissions, thereby distinguishing this case from *Pickens.* See discussion *infra.* Furthermore, *Pickens* predated the 1970 amendment to Rule 36 which in part were enacted to resolve a conflict among courts with respect to the binding effect of an admission. (*Federal Rules,* West Pub. Co., 1980 ed., at 83). The 1970 amendment explicitly favors the principle that *any* matter admitted under the rule is conclusively established unless the court in its discretion permits withdrawal. Plaintiff thus rightly contends that the better rule allows requests to go to all the fact issues in an action:

> Some courts and commentators have said that Rule 36 is not intended to be used to cover the entire case and every item of evidence. There is no basis in the rule for these comments and no discernible reason for such a limitation. The statements to this effect do not rise above the level of dicta, and they were uttered in cases in which the requests were objectionable on other grounds, usually because they were prolix and unclear. Thus the sounder perception is that of a commentator who says: "It is appropriate, therefore, to note that a party who wishes to cover the entire case should proceed with care. There should be no question, however, concerning his right to proceed."

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2251, and 710 (1970) (footnotes omitted).

Plaintiff asserts further that, contrary to defendant's averment, he had ample opportunity to preserve his interest in a defense on the merits by properly objecting to the requests for admissions or by timely responding to them in an adequate manner. Defendant has allegedly repeatedly failed to comply with discovery requests. The recent procedural history of said discovery supports plaintiff's contention.

By motion of April 12, 1982, defendant moved this court for an order that the March 10, 1982 and April 2, 1982 requests for admissions need not be answered, arguing in part that a protective order was required because defendant had the constitutional right not to be required to give testimony against himself and that the requests were unduly burdensome, embarrassing, expensive, or annoying. By motion of April 15, 1982, plaintiff moved for an order deeming certain matters admitted with respect to the March 10 request; defendant filed an oposition to this motion. On April 23, plaintiff filed an opposition to defendant's motion for a protective order. Both motions were consolidated and argued before Magistrate Rothwell on May 7, 1982. By order of May 7, the magistrate permitted both parties to supplement their moving and opposing papers. Both parties thereby gained a second opportunity to present their arguments with respect to the requests for admissions.

By order of May 14, the magistrate addressed the matter of defendant's responses and objections to the March 10 Request for Admissions. The magistrate's analysis is revealing:

> Defendant Quinlan's papers supplementing his motion for protective order contain his responses to 314 of 570 requests for admissions. These responses are composed of very few admissions and denials, a number of claims of privilege against self-incrimination and lack of information known or readily available to enable an admission or denial.
>
> Defendant Quinlan's answers are perfunctory in form and could have been prepared as filed in little time. At the argument it was not challenged that though defendant Quinlan has had the same attorney of record since September, 1981, he has sought no formal discovery. A review of the moving and opposing papers indicate his tactics in opposition to plaintiff's efforts at obtaining discovery could be described as those of an obstructionist. With a trial date fast approaching, the plaintiff's concern with obtaining the means of proving a *prima facie* case and the translation of that need into searching requests for admissions is entirely understandable.

Defendant had a third opportunity to validate his objections and responses to the requests for admissions, having moved for reconsideration of the magistrate's order granting plaintiff's motion to deem admitted a number of requests for admissions and denying the defendant's motion for a protective order. By Order of June 4, 1982, this court affirmed in part the magistrate's order and deferred ruling on the magistrate's decision to deem admitted certain of the requests for admissions as to which the defendant had asserted the privilege against self-incrimination; we permitted the parties further to brief the issue. By Order of July 12, this court analyzed the fifth amendment issues with respect to the magistrate's decision to deem matters admitted to the extent that defendant had asserted the fifth amendment as a ground for not responding and affirmed the magistrate's ruling. Defendant, therefore, has had ample opportunity to address his claim of privilege against self-incrimination.

The cases which permit untimely responses to requests for admissions or withdrawal of admissions have emphasized that the evidence did not indicate prejudice to the opposing party. See *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355 (W.D. Mich. 1980); *Pleasant Hill Bank v. United States*, 60 F.R.D. 1 (W.D.Mo. 1973). The Advisory Committee notes to the 1970 amendments to the Federal Rules comment:

> The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance

> a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. [citation omitted]. Unless the party securing the admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.
>
> Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. [citation omitted]

Federal Rules, supra, at 83.

In the instant case, it is clear that plaintiff would be substantially prejudiced by a withdrawal of admissions since it has relied heavily upon the admissions in preparation and support of its Motion for Partial Summary Judgment. A wholesale revocation of the admissions, plaintiff avers, would make preparation of the summary judgment motion a "largely futile and very costly exercise." Moreover, plaintiff has allegedly foregone other formal discovery in reliance upon the deemed admissions. The discovery cutoff date has passed and hence, plaintiff cannot utilize further discovery to augment its case in chief.

This matter presents a situation in some respects comparable to *Weva Oil Corp. v. Belco Petroleum Corp.,* 68 F.R.D. 663 (N.D.W.Va. 1975). In that case, Weva filed an objection to a motion for summary judgment and moved at the same time for an entry of an order permitting an untimely response to requests for admission propounded by counterclaimant, Belco. The court noted that permitting an untimely response would prejudice Belco by requiring it to prove at trial matters already deemed admitted by operation of Rule 36. *Id.* at 666. The court further remarked that such proof at trial would "be lengthy, laborious and extremely costly" to Belco, the party who had obtained the admissions. *Id.* at 667. The court continued:

> In considering the weight of prejudice in such circumstances, the court must not treat lightly such burdens when visited upon a litigant, especially when that litigant has properly utilized the Rules of Civil Procedure to advance his litigation toward a ". . . [j]ust, speedy and inexpensive . . ." (Rule 1, F.R.C.P.,) conclusion. The expressed language of the Federal Rules of Civil Procedure as well as the spirit the Rules support, it seems, Belco's position in this issue.

Id.

Finally, if the admissions are withdrawn, plaintiff will assertedly be forced to rely more heavily upon witness testimony in order to prove both defendant's knowledge of the alleged Hot Box misrepresentations and his supervisorial responsibilities. Plaintiff contends that witness memories are failing and evidence growing stale, and will particularly do so if the trial is continued, as defendant requests.

In a recent Ninth Circuit decision, *Asea, Inc. v. Southern Pacific Transportation Co.,* 669 F.2d 1242 (9th Cir. 1981), the court noted the ruling in *Westmoreland* and countered that:

> [C]ourts have held that a request for admissions, and thus an admission itself, is not improper merely because it relates to an "ultimate fact," *City of Rome v. United States, supra*, 450 F.Supp. at 383, or to an issue of fact that is dispositive of the merits of the case [citation].

Id. at 1248.

Although declining specifically to pass on the above issue, the court remarked that the defendants were actually asserting

> that they had an absolute right under Rule 36(b) to have the admissions withdrawn. Such a reading seems especially inappropriate when the Rule uses the discretionary term "the court may." A *per se* rule that the district court must permit withdrawal of an admission which relates to an important or dispositive matter is inappropriate in light of the purpose of the discovery device: to narrow the issues for trial and avoid litigation of unessential facts. In a proper case, of course, such as when an admission has been made *inadvertently*, Rule 36(b) might well require the district court to permit withdrawal.

Id. (emphasis added).

In that case, the defendant railroads had responded to many of the plaintiff's requests for admissions with a conclusory statement, merely tracking the statutory language, that defendants had made reasonable inquiry and did not have adequate information to admit or deny the requests. From the record, it appeared possible that the defendants either possessed fuller information than they had indicated or had subsequently obtained fuller information. The district court deemed the matters admitted and denied the defendants' later motion to withdraw the admissions. The Ninth Circuit, although vacating the district court's judgment and remanding for the purpose of determining whether the defendants had indeed failed to make reasonable inquiry of whether information readily obtainable was sufficient to allow them to admit or deny the requests stated:

> We are not persuaded that an answer to a request for admission necessarily complies with Rule 36(b) merely because it includes a statement that the party has made reasonable inquiry and that the information necessary to admit or deny the matter is not readily obtainable by him. The discovery process is subject to the overriding limitation of good faith. . . . In our view, permitting a party to avoid admitting or denying a proper request for admission simply by tracking the language of Rule 36(b) would encourage additional abuse of the discovery process.

Id. at 1246.

The court suggested that a district court was free to order a matter admitted "when it has been demonstrated that a party has intentionally disregarded the obligations imposed by Rule 36(a)." *Id.* at 1247.

We conclude that our holding in the instant case satisfies the concerns of *Asea*. The foregoing history of this litigation demonstrates that the deemed admissions cannot be said to have resulted from inadvertence or mistake, as was the case in *Pickens*. This court noted in its Order of June 7, 1982, that

> it was clear from defendant's Affidavit in Opposition to the Preliminary Injunction . . . that defendant did, in fact, possess information which would have enabled him to admit at least some of the matters asserted by plaintiffs in its requests for admissions. In view of this discrepancy between . . . [the] earlier statements in his affidavit and his present refusal to admit or deny, the Magistrate was justified in concluding that defendant did not lack sufficient information with which to respond to some of plaintiff's requests. As to those requests, under Rule 36(b), defendant had failed to set forth in sufficient factual detail why he could not truthfully deny or admit the matters asserted.

We further affirmed the magistrate's decision to deem admitted other matters as to which defendant had claimed inadequate knowledge "in view of the clear discrepancy between the affidavit and a number of defendant's responses to the requests for admissions, and in view of defendant's history of obstructionist tactics throughout the discovery period." Although afforded an extensive opportunity to provide the magistrate and this court with some evidence that he had affirmatively sought the relevant information from, for example, co-employees of Hot Box, defendant's responses, like those of the defendants in *Asea,* merely tracked the statutory language. We conclude, on the basis of the *Asea* remarks, that a party has an obligation to provide the court with evidence that the party has made reasonable, affirmative efforts to obtain the relevant information.

Furthermore, in our Order of June 7, we provided the parties with additional opportunity to address defendant's assertion of the privilege against self-incrimination, upon which he based his refusal to respond to virtually all of the 570 requests for admissions. Even with such further opportunity, defendant failed to provide this court with adequate evidence from which we could make an intelligent evaluation of defendant's claim of privilege. See *David v. Pendler,* 650 F.2d 1154 (9th Cir. 1981). Defendant's counsel proffered the sole fact that he also represented defendant in regard to a grand jury investigtation in which defendant was a subject of investigation, as well as H.N. Singer, Inc., d/b/a Hot Box Products, and many of the former codefendants in the instant action. However, such a bare fact was quite insufficient to support a broad claim of privilege; by the specific language of Rule 36, admissions cannot be used collaterally against the defendant in any other proceeding, and the aforementioned fact does not of itself provide adequate evidence that the admissions could provide a link in the chain of evidence against him. In this court's Order of July 12, we concluded:

> [A]n assertion of the privilege is not proper if it is so general as to encompass virtually all questions propounded, including questions which do not pose an evident danger of incrimination; and if the privilege is unsupported by sufficient factual information from which the judge can make an intelligent evaluation of the claim.

Id. at 4.

The procedural history of this case reveals the defendant's "intentional disregard" of the requirements of Rule 36 alluded to by *Asea,* rather than an excusable oversight. Furthermore, the plaintiff herein has adequately demonstrated the likelihood of substantial prejudice, unlike the plaintiff in *Asea*. We hold, therefore, that the Motion To Withdraw Admissions shall be denied. Defendant's conclusory, tardy and inadequate responses were not a result of inadvertence or surprise; he was represented by his new counsel, Mr. Twitty, at all relevant times. Defendant might have anticipated the "prejudicial" effect of the admissions and moved to withdraw them at an earlier date, which would have prevented the plaintiff's evident reliance thereon. This case should not be further delayed by defendant's attempt to render Rule 36(a) a nullity.

II. *Plaintiff's Motion To Strike Defendant's Declarations*

Plaintiff brings this Motion To Strike defendant's Declarations in Support of his Motion for a Continuance of the Trial Date and his Opposition to plaintiff's Motion for Partial Summary Judgment. Plaintiff asserts that the crucial portions of each are in flagrant violation of Rule 56(e), F.R.Civ.P., and Local Rule 220-7 which states:

> Affidavits and declarations shall contain only facts, shall conform as far as possible to the requirements of Rule 56(e), Federal Rules of Civil Procedure, and shall avoid conclusions and argument. Any statement made on information or belief shall specify the basis therefor. Affidavits not in compliance with this Rule shall be subject to being stricken in whole or in part.

Rule 56(e) requires that affidavits "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence."

Declaration in Support of Motion To Continue Trial Date

Plaintiff correctly contends that the statements in paragraph 3, concerning defendant's communications with the witnesses whom he wishes to call and who are under indictment, are blatant hearsay. Paragraphs 6 and 7 in their entirety are based on defendant's belief that those witnesses are credible and reliable and that defendant will be able to secure their presence at his trial. The statements, however, do not specify the basis thereof. Defendant has not obtained the declarations of said witnesses indicating that they indeed would be present to testify at trial. Plaintiff's contentions are therefore correct; the paragraphs shall be stricken.

Defendant's Declaration in Opposition to Motion for Partial Summary Judgment

Plaintiff asserts that defendant's attempt to deny his knowledge of alleged misrepresentations perpetrated by Hot Box salesmen and his supervisorial authority thereof directly contradicts the deemed admissions and should be disallowed. Because we have denied defendant's motion to withdraw the deemed admissions, we also concur with the FTC's contention herein and grant its request.

The declaration is so pervaded by heresay, contradiction of admissions, belief stated without providing a basis therefor (such as declarations of others), and a failure to provide sworn or certified copies of all papers referred to in the declaration, that it shall be stricken in its entirety.

III. *Plaintiff's Motion for Partial Summary Judgment*

Plaintiff FTC moves for partial summary judgment pursuant to Rule 56, F.R.Civ.P. Plaintiff contends that the following facts are not in dispute:

A. *Jurisdiction and Venue*

1. *Subject Matter Jurisdiction*

Subject matter jurisdiction is based on 28 U.S.C. §§ 1331(a) and 1337, since this case is brought pursuant to the Federal Trade Commission Act, a law of the United States respecting commerce; and on 28 U.S.C. § 1345 because the FTC is an agency of the United States authorized to bring suit, 15 U.S.C. §§ 53(b), 57, and we conclude that plaintiff's assertions are correct. Defendant admits these bases of jurisdiction.

2. *In Personam Jurisdiction and Venue*

In defendant's Motion To Dismiss of October 6, 1980, he failed to assert the above defenses. Rule 12(h) provides that such defenses are waived if not asserted under the circumstances described in Rule 12(g) (a party must assert a defense available to him when making a motion under Rule 12). Defendant does not contest that the defenses are waived.

B. *Activities of Hot Box in or Affecting Commerce*

An essential predicate to the assertion of the Commission's authority under Section 5 of the FTCA is that the challenged acts or practices be "in or affecting commerce" 15 U.S.C. § 45(a). "Commerce" is defined in Section 4: "'Commerce' means commerce among the several states or with foreign nations, . . . or in the District of Columbia."

The showing necessary to establish that acts or practices are "in or affecting commerce" is a modest one. In *Federal Trade Commission v. Simeon Weight Management Clinics,* 391 F.Supp. 697 (N.D.Cal. 1975), aff'd, 532 F.2d 708 (9th Cir. 1976), the court found sufficient contacts with interstate commerce in the fact that the respondents placed "their advertisements in newspapers, magazines, and on television with out-of-state circulations and broadcast ranges." *Id.* at 703. "Even without an out-of-state sale, the fact that respondents cause their advertisements to be disseminated out of state is enough to fulfill the commerce requirements of the Act." *Id.* Allegedly, Hot Box regularly and systematically disseminated advertisements in newspapers throughout the United States. Moreover, numerous other activities of Hot Box were almost entirely in interstate commerce. Potential investors in various states were invited to use and did use a toll-free telephone number to call Hot Box Products from wherever they lived. Packages of promotional material were sent through the United States Postal Service to potential distributors in a number of states other than those where Hot Box did business. Oral sales presentations were made by telephone to potential investors in other states. A number of potential distributors accepted Hot Box Products' invitation to fly, at Hot Box expense, from their states of residence to Hot Box Products' offices in either Nevada or Illinois.

Furthermore, Hot Box executed purchase agreements with distributors living in a number of states other than Illinois or Nevada. Pursuant to those agreements, Hot Box Products ordered ovens to be shipped from Wisconsin and pizzas to be shipped from Illinois to distributors in approximately 20 states, the District of Columbia and Canada. Plaintiff supports these statements with numerous affidavits and depositions and with defendant's admissions. Defendant does not contest that at all relevant times the activities of Hot Box Products were in or affecting commerce within the meaning of the FTCA.

C. *Defendant's Liability for Violations of Section 5 of the FTCA*

1. *"Proper Case"*

Plaintiff contends that this prayer for a permanent injunction and ancillary relief is based on section 13(b) of the FTCA which permits the issuance of an injunction in "proper cases." Citing legislative history, Senate Report, 93-151 at 30-31, plaintiff asserts that a broad reading of the phrase is appropriate. See also 119 Cong. Rec. 22979, 36611. In *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), the court held that a routine fraud case is a type of proper case. *Singer* involved the same practices at issue herein. We conclude that this is also a routine fraud case, but note that *Singer* did not limit the phrase's applicability to fraud cases alone. See also *FTC v. Virginia Homes Mfg. Co.*, 509 F.Supp. 51 (D.Md. 1981), aff'd, 661 F.2d 920 (4th Cir. 1981) (violation of Magnuson-Moss Warranty Act); *United States v. National Dynamics Corp.*, 525 F.Supp. 380 (S.D.N.Y. 1981). Plaintiff argues that the appropriate reading of "proper cases" includes any case to which the applicable rule of law is clear enough that the court can readily rely upon prior precedent or express statutory authority in determining the meaning of "unfair" or "deceptive." Two broad categories of cases will fall within this definition. One includes cases in which violations have been alleged of laws which the Commission enforces, where the law itself is unambiguous, such as certain provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*

The second category plaintiff suggests, includes cases, such as the instant case, in which practices are alleged which the Commission or reviewing courts have clearly condemned as unfair or deceptive. Such practices include "misrepresentations of fact to induce purchases of goods [which] constitute . . . unfair or deceptive acts or practices . . . which by the plain terms of the [FTC] Act . . . are declared to be 'unlawful.'" *National Trade Publications Service, Inc. v. Federal Trade Commission,* 300 F.2d 790, 792 (8th Cir. 1962). Similarly, misrepresentations of present intentions—false promises—to induce the purchase of goods have been held unfair and deceptive acts or practices. *Goodman v. FTC,* 244 F.2d 584 (9th Cir. 1957); *Windsor Distributing Co.,* 77 F.T.C. 204 (1970).

The Commission has repeatedly declared unfair or deceptive certain specific misrepresentations in the context of franchising and business opportunities. Thus, the Commission clearly condemned misrepresentations of the earnings of existing franchisees or distributors in *Goodman, supra,* and in *Universal Credit Acceptance Corp.,* 82 F.T.C. 570 (1973), order modified in part, *sub nom. Heater v. FTC,* 503 F.2d 321 (9th Cir. 1974). Representations of future or expected earnings which are made without a reasonable basis in fact or which differ sharply from the experience of existing distributors have also been condemned. *Goodman, supra; Universal Credit, supra; National Dynamics Corp.,* 82 F.T.C. 488, 565 (1973).

The Commission has also clearly condemned the false appropriation of the business history of an established company by a new company, *Waltham Watch Co. v. FTC,* 318 F.2d 28 (7th Cir. 1963).

Plaintiff contends that Hot Box Products has engaged in all of the above practices and that, therefore, this case is a "proper case" within the meaning of the statute. The entire argument is rather oblique; however, the legislative history is broad and ambiguous and the case law evidently sparse. Furthermore, this case is a continuation of the *Singer* case which the Ninth Circuit found to be a "proper case." Plaintiff has provided substantial proof, by affidavits and depositions, that Hot Box engaged in the aforementioned practices; defendant's admissions establish his knowledge of, and authority to control, said practices. We therefore conclude that this is a "proper case" within the meaning of the statute.

2. *Liability of a Manager*

The FTC asserts that defendant was Sales Manager of Hot Box Products from March 1-April 3, 1980. Defendant admits this fact. A manager is liable for deceptive acts of his subordinates if he had the authority to control those acts and, with knowledge of the acts or practices, failed to control them. Defendant's admissions establish his knowledge of the fraudulent practices and his authority to control the oral and written misrepresentations of the salesmen.

Plaintiff further charges that defendant's use of an alias while at Hot Box Products is evidence of conscious deception. In his declaration, defendant responds that such use of aliases is a common method of evaluating promotional techniques. Were it not for his admissions, and his failure to establish a basis for belief in his declaration, the significance of his use of an alias would remain an issue of fact. On the basis of such flaws, however, we have previously determined that his declaration be stricken in its entirety. It therefore cannot serve as a basis to establish an issue of material fact.

Plaintiff avers that defendant's involvement in two prior fraudulent schemes, E-Z Host and Gourmet Systems, is further evidence of his knowledge of the fraudulent practices herein alleged. Defendant claims he was not responsible for any similarities amongst the businesses. Again, however, his declaration so asserting has been stricken; he provides no basis for his statement of belief that defendant Wiehoff was responsible for the resemblances. Plaintiff has established the parallel nature of Gourmet Systems and Hot Box Products by means of numerous affidavits and depositions.

Most importantly, defendant's admissions establish his knowledge of and authority to control the deceptive practices of the salesmen. See further discussion *infra.* His declaration to the contrary is a nullity. Such authority, coupled with the above-established knowledge, renders him liable. *Universal Credit, supra; Windsor Distributing Co.,* 77 F.T.C. 204 (1970), aff'd, 437 F.2d 443 (3rd Cir. 1971).

Plaintiff argues that liability may also be imposed on one who retains the fruits of fraud with knowledge thereof. *Universal Credit, supra; Curtis Publishing Co.,* 78 F.T.C. 1472, 1516 (1971). Defendant concedes that he was to receive a five percent commission from all sales of franchises by salesmen who had received their assignments from him. Thus, there is a genuine issue of fact regarding whether the $44,305 received by defendant, as established by his admissions and by plaintiff's documentary evidence, included commissions from sales which were consummated during his tenure but concerning which he had not made the sales assignments.

There is no genuine issue of fact that during defendant's tenure, various misrepresentations constituting deceptive acts and practices were committed by Hot Box salesmen. These misrepresentations include oral and written earnings claims, false references to purportedly successful distributors, appropriation of H.N. Singer, Inc.'s name and business history, statements that the pizza products were unique and exclusive and were manufactured by one of the largest pizza producers in the world, claims that Hot Box made its profits on reorders of product, statements that inexpensive freezer space was readily available, and promises that a dealer manual would be provided and that distributors would receive full company assistance, guidance and training. Defendant does not contest that these misrepresentations were made, nor that they were false. The FTC supports their assertions with myriad affidavits, depositions and documents.

The FTC asserts that defendant had knowledge of all aforementioned representations, as well as knowledge of their falsity, and that he had the authority to control these misrepresentations and failed to do so. Defendant's admissions establish these facts.

Finally, plaintiff claims that defendant is liable not only for the monies received by Hot Box as a result of the misrepresentations disseminated while he was Sales Manager but also for the money received during his tenure which receipt was a result of prior misrepresentations. Defendant contests the latter liability but cities no cases in support of his position. Plaintiff's "retention of fruits" argument, does not adequately establish its position, as we previously indicated. Defendant is, however, clearly liable for the money paid by the twelve investors who had executed purchase agreements with Hot Box or who received material misrepresentations from or on behalf of Hot Box during defendant's tenure. This amounts to $290,000. The issue of further liability remains a question of fact. Moreover, the court is not fully persuaded that plaintiff's "retention of fruit" argument is applicable to the instant situation.

Plaintiff asserts that defendant is further liable for interest on this amount accruing from the dates of the fraudulent transaction. It contends that recovery of interest accruing from the transaction date on a definite sum as a result of fraudulent misrepresentations is permitted in this Circuit, citing *Vanderbilt v. Bishop,* 188 F. 971 (C.C.D. Or. 1911), aff'd 199 F. 420 (9th Cir. 1912), and that the applicable rate of interest is the legal rate fixed by the law of the forum state, citing *Butte A. & P. Ry. Co. v. United States,* 61 F.2d 587, 591 (9th Cir. 1932), rev'd on other grounds, 290 U.S. 127 (1933). Plaintiff asserts that the statutory rate in California is ten percent per annum, citing C.C.P. § 685.010 (1982). This code section, however, does not address interest rates. In light of such tenuous and, indeed, inaccurate authority, and in view of the unresolved amount of restitutionary liability, the court declines to pass upon these issues at the present time.

With respect to defendant's liability under Count Two of plaintiff's Amended Complaint for Injunction, Restitution and Other Relief, partial summary judgment shall be granted. There are no genuine issues of fact as to the following matters:

(1) That subject matter jurisdiction, *in personam* jurisdiction and venue are proper in this case;

(2) That at all relevant times the activities of Hot Box Products were in or affecting commerce within the meaning of the FTC Act;

(3) That defendant was the Sales Manager of H.N. Singer, Inc., d/b/a Hot Box Products, from on or about March 1, 1980 to April 3, 1980, and his job duties were to supervise, and he did supervise, the salesmen engaged to sell the Hot Box Products distributorship program;

(4) That defendant knew of certain oral and written representations of material fact, of certain earnings claims and of certain promises made by or on behalf of Hot Box Products to prospective purchasers of Hot Box Products distributorships;

(5) That from the inception of his employment at Hot Box, defendant knew that the aformentioned representations, claims and promises were false, or had no reasonable basis for believing them to be true;

(6) That defendant had the authority to approve, and he did review, the written promotional materials containing the aforementioned representations, claims and promises; and he had the authority to approve, and he did review, all oral representations, promises and claims made by the salesmen;

(7) That as remuneration for his employment as sales manager by H.N. Singer, Inc., d/b/a Hot Box Products, defendant received at least $44,305;

(8) That as a result of the various oral and written misrepresentations made to them by Hot Box and its sales force, fifteen investors who purchased or paid for distributorships during defendant's tenure paid a total net amount of $365,000 as purchase prices.

Summary judgment is denied on the issues of

(1) The total dollar amount of defendant's liability;
(2) The appropriateness of the imposition of pre-judgment interest;
(3) The date from which it would accrue, if appropriate; and
(4) The rate thereof.

IV. *Defendant's Motion for Continuance of Trial Date*

Defendant Quinlan moves the court, pursuant to Rule 39(b) of the F.R.Civ.P., for an order that this case be tried before a jury, on the grounds that defendant's original counsel did not demand a jury trial and that justice will be best served by having a jury function as the trier of fact. Mr. Twitty, defendant's present counsel, was substituted on April 25, 1981.

None of the original defendants to this action made demand for a jury trial within the limits established by Rule 38(b). Hence, any right to a jury trial was waived. Rule 39(b), however, empowers the court, in its discretion, upon motion, to order a trial by jury.

Defendant contends that the applicable case law supports the principle that the court should grant a jury trial "in the absence of strong and compelling reasons to the contrary," citing *Swofford v. B&W, Inc.*, 336 F.2d

406, 409 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965). The Ninth Circuit, however, does not adhere to the *Swofford* rule; instead, it espouses the Second Circuit principle articulated in *Galella v. Onassis,* 487 F.2d 989, 996 (2d Cir. 1973) that "[u]ntimely requests for a jury trial must be denied unless some cause beyond mere inadvertence is shown." See *Mardesich v. Marciel,* 538 F.2d 848, 849 (9th Cir. 1976). Therefore, the failure of counsel to request a jury trial on the basis of a "slight oversight," *id.,* or a misunderstanding of the Federal Rules, *Aetna Casualty & Surety Co. v. Jeppesen & Co.,* 642 F.2d 339, 341 (9th Cir. 1981), or of the state of the law, *Sutton v. Atlantic Richfield Co.,* 646 F.2d 407 (9th Cir. 1981) will not justify nor require an order granting a jury trial. Such malfeasance by counsel constitutes "mere inadvertence." *Sutton, supra; Jeppesen, supra.* The Ninth Circuit has "strictly applied Civil Rules 38 and 39." *Bell v. Cameron Meadows Land Co.,* 669 F.2d 1278, 1285 (9th Cir. 1982). The fact that counsel in charge of a case was preoccupied with the impending dissolution of the law firm, *Bell, supra,* or was swamped with other work and allowed the complaint to be prepared by a young associate (although also signed by several other attorneys), *Chandler Supply Corp. v. GAF Corp.,* 650 F.2d 983 (9th Cir. 1980), will not relieve a party from the resultant waiver of a jury trial.

Indeed, even under the *Swofford* rule, mere inadvertence will not excuse a failure to request a jury trial. *Bush v. Allstate Ins. Co.,* 425 F.2d 393 (5th Cir. 1970), unless a demand is made shortly after the expired deadline rather than upon the eve of trial, compare *Berger v. Goodyear Tire & Rubber Co.,* 83 F.R.D. 114, 116 (S.D.N.Y. 1979) (request only three weeks late) with *Mesa Petroleum Co. v. Coniglio,* 629 F.2d 1022, 1029 (5th Cir. 1980) (request made less than one month before trial, two years after original complaint and five months after amended complaint).

The Ninth Circuit has similarly expressed a disinclination to rectify a waiver if the request is offered months after the answer has been filed and is made just before trial. *Johnson v. Gardner,* 179 F.2d 114 (9th Cir. 1950). In the instant case, counsel for defendant should have been aware of the prior counsel's dereliction when the former was substituted, on August 25, 1981, and certainly no later than May 7, 1982, the date on which plaintiff filed its Pretrial Statement, in which the fact that no party had requested a jury trial was stated. Thus, counsel has permitted from five to thirteen months to elapse before bringing this motion less than two months before the scheduled trial date. Counsel has not explained the reason for this delay.

The fact that an attorney's inadvertence will not relieve a party of a waiver should, by logical implication, suggest that the inadvertence of prior counsel will not justify a substituted counsel's subsequent motion under 39(b) to be relieved of the effects of prior counsel's oversight or negligence. And, indeed, several courts have so stated. In *Polak v. Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland,* 19 F.R.D. 86, 88 (S.D.N.Y. 1956), the court noted:

> Mere inadvertence of counsel, however, is not sufficient grounds for the relief sought. [citations]. The requirements of the Rules in this respect facilitate efficient administration of court business by early allocation of cases to the appropriate calendars. Judicial discretion to permit a belated transfer to the jurv calendar is not exercised lightly. 5 Moore, *Federal Practice* 715 *et seq.* The opinion of counsel that his predecessor erred or was negligent is not a compelling argument for this extraordinary relief. [citation].

The court granted the 39(b) motion therein because the counsel was also counsel in other actions and would consent to consolidation of all if a jury trial were granted. Where the only evidence peculiar to each case pertained to damages and most of the court's time would be consumed by the common issues, the advantages of consolidation outweighed, in the court's opinion, the requirements of strict enforcement of the Rules. *Cf. Ford v. Breier,* 71 F.R.D. 195 (E.D. Wis. 1976), where the court granted a 39(b) motion brought by new counsel within three weeks of his retention *and* where the motion was unopposed by the other party. The *Ford* court warned, however, that it was clearly not suggesting "that the provisions of Rule 38 may generally be avoided by a substitution of counsel followed by a motion for a jury trial." *Id.* at 197.

Defendant's counsel, Mr. Twitty, has declared his belief that defendant will best be able to defend this action if a jury serves as a trier of fact, and that plaintiff FTC will not be harmed or inconvenienced by the granting of the motion. Contrary to the requirements of Local Rule 220-7, he has failed to specify the basis of this belief. Hence, it is appropriate for the court to disregard these statements. Moreover, the FTC asserts vigorously that, to the extent that its pretrial preparation has been directed toward presenting its case to the court as a trier of fact, it will indeed suffer prejudice if the motion is granted. Such a contention has precluded the granting of a 39(b) motion even in a *Swofford* jurisdiction. *United States v. Unum, Inc.,* 658 F.2d 300, 303 (5th Cir. 1981) (motion made a few days before final docket call). Defendant's motion was made after the discovery cut-off date had passed and a mere two months before the trial date. We conclude that plaintiff would indeed be prejudiced, at this late date, by a decision to afford defendant a jury trial.

In light of the above, we conclude that defendant has provided no basis for the exercise of the court's discretion to grant a jury trial under 39(b).

The FTC argues that there is *no* right to a jury trial in a case such as this, which arises under a federal statute and invokes the equitable authority of the federal courts. The seventh amendment provides that the right to trial by jury in civil cases "shall be preserved." It "neither enlarged nor restricted the common law right of jury trial, nor do the Rules enlarge or restrict the right as preserved by the Seventh Amendment and any additional federal statutory right." J. Moore, 5 *Federal Practice* ¶ 38.11[1] at 38-71 (1982). It does not apply to equitable matters, despite the merger of law and equity under the Federal Rules. J. Moore, *Federal Practice and Procedure* § 22.01[4] (1981).

The FTC in the instant case is seeking restitution, in the public interest, of monies paid by third parties, as well as injunctive relief. In *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982), the Ninth Circuit recognized the fundamentally equitable nature of both of the legal bases of this case. It further recognized that the granting of rescission and restitution are equitable remedies, ancillary to the court's exercise of its equitable authority. *Id.* at 1112. Thus, it appears that this matter has already been recognized to be fundamentally equitable in nature. However, because we conclude that, even if a right to trial by jury did exist in the instant case, that right has been waived, and because we decline to exercise our discretion to relieve defendant of his waiver, we need not reach the issue of the applicability *vel non* of the seventh amendment.

V. *Defendant's Motion for Continuance of Trial Date*

Defendant seeks a continuance of the trial date on the grounds that he, although not indicted, is under investigation in pending federal criminal proceedings premised essentially upon the facts at issue herein and therefore cannot properly defend this civil action while maintaining his fifth amendment right against self-incrimination as to the ongoing investigation. Furthermore, defendant asserts that the testimony of several already-indicted individuals is essential to his ability to defend this action and, if this civil action proceeds to trial before the determination of the parallel criminal proceedings, those persons will refuse to testify on self-incrimination grounds.

A. *Testimony of Witnesses*

In his declaration in support of this motion, defendant claims that several of the persons presently under indictment in Chicago have agreed to testify to the effect that defendant was not a party to any of the acts alleged to be in violation of federal law and that he was merely an employee of Hot Box with limited duties. These witnesses, defendant argues, are the only persons with such knowledge. In support of his position, defendant cites *Holt v. Utility Trailers Mfg. Co.*, 494 F.Supp. 510 (E.D. Tenn. 1980), wherein an expert witness was unable to testify on the scheduled trial date, because of illness. On the statement of counsel that the testimony was vital and not cumulative, the court granted a continuance. Defendant relies also upon *United States v. Hasiwar*, 299 F.Supp. 1053 (S.D.N.Y. 1969), in which the only witnesses whose testimony could exonerate the defendants were also under indictment, and would refuse to testify on self-incrimination grounds. On defendants' motion, further proceedings were stayed pending completion of criminal proceedings against the prospective witnesses:

> At least one of these witnesses has indicated that he would, if called, exercise his privilege against self-incrimination, but that he would be willing to testify once the charges against him had been disposed of, whatever the disposition. It is believed that testimony favorable to defendants can be elicited from these witnesses. It seems highly probable, under the circumstances of this case, that these witnesses would all be compelled to exercise their privilege and refuse to testify on behalf of these defendants prior to the trial of the narcotics case. The Government has come forward with no valid reason for the order of trial of these cases upon which it has embarked.

Id. at 1057.

However, *Holt* involved a request for a relatively short delay in the trial date filed reasonably soon after the facts upon which the requests were based were made known to the movant. In the instant case, Mr. Twitty became counsel for defendant on August 25, 1981, at which time the criminal investigation was already in progress; indeed, Mr. Twitty represents defendant in connection with the investigation. Yet defendant has waited almost 13 months before filing a motion for continuance. A movant's diligence *vel non* in requesting a continuance is an important factor to be weighed by the trial court. See *Gaspar v. Kassm,* 493 F.2d 964 (3rd Cir. 1974). Here, the defendant has offered no excuse for his present dilatoriness. Numerous cases, in denying a continuance, have emphasized that the movant had delayed in requesting a continuance and had offered no excuse for such delay. See, e.g., *Mull v. Marathon Oil Co.,* 658 F.2d 386, 387 (5th Cir. 1981) (motion filed 18 months after trial date set, but two weeks before the trial was due to begin); *Reeg v. Shaughnessy,* 570 F.2d 309, 316 (10th Cir. 1978) (two month delay after court had announced rule of law it would use before continuance sought to conduct additional discovery); *Lopez v. Arkansas Independent School District,* 570 F.2d 541 (5th Cir. 1978) (plaintiffs knew that one plaintiff would be unavailable for trial on date set by court but did not move for continuance until day of trial). Moreover, the continuance in *Holt* would, unlike that in the instant case, have been of brief duration.

Hasiwar, supra, is also distinguishable, in that it involved a *criminal* action. Thus, the granting of a continuance in that case turned on the trial court's special "responsibility to insure a fair trial." *Id.* at 1056, citing *McNabb v. United States,* 318 U.S. 332 (1943). The solicitude demonstrated by the court in *Hasiwar* toward the defendant, therefore, would not necessarily be appropriate in civil case. Furthermore, the witnesses had affirmatively indicated their willingness to testify, defendant herein has provided no such proof of the witnesses' future availability or cooperation.

Defendant has also failed otherwise to make a proper showing that a continuance should be granted on the above basis. First, defendant's declaration in support of the continuance is fatally defective. The portion which refers to said witnesses and their willingness to testify is based entirely on hearsay and should be disregarded (see discussion of Motion To Strike, *supra*). Second, the portion which asserts that their attendance could be secured does not specify the basis for defendant's belief. *Id.* Defendant has produced no other evidence which would suggest that he will be able to secure the testimony of these witnesses; he has not provided the court with their declarations of intention to testify. Both Luks and Bennett were named defendants in the present action. Default judgments were entered against each; Luks failed even to file an answer. Nor are they clearly within the jurisdiction of the court for purposes of subpoena. Third, the testimony of James Wiehoff will not clearly assist defendant. Wiehoff's affidavit of August 9, 1980, stated that he left Hot Box Products in December, 1979. Thus, it is unclear how he could have had personal knowledge of defendant's duties or authority during the subsequent March. Fourth, Sidney Bennett is presently a fugitive from justice. His fugitive status indicates that there may be no reasonable prospect that he would be available to testify for defendant.

Furthermore, plaintiff's Pretrial Statement of May 7, 1982, did not list Wiehoff, Luks, Thayer or Bennett, and at the Pretrial Conference of May 17, defendant's counsel indicated that he would call no witnesses not included on plaintiff's list. Yet their testimony should have appeared to defendant to be as "essential" to defendant's case then as now, five months later.

Finally, defendant's motion will work a substantial hardship on plaintiff. By requesting a continuance until after the criminal proceedings, assumedly including any appeals or retrials, defendant is suggesting a stay of *years,* rather than weeks or months. Bennett may never be available. To the extent that defendant's status as the subject of a criminal investigation prevents his testifying, the delay would be measured by the statute of limitations for the offense being investigated. The last acts of which defendant stands charged in this action occurred in April, 1980. The federal statute of limitations for non-capital crime is five years, 18 U.S.C. § 3282. If this action is to be postponed until defendant is safe from criminal prosecution, it will not go to trial until April, 1985. The prejudice plaintiff would suffer from such a delay is two-fold. The memories of witnesses will fade, and the defrauded investors will be further delayed, beyond the 2-3 years they have already waited, for adjudication of their harm.

B. *Defendant's Privilege Against Self-Incrimination*

Defendant claims that he is still the active subject of an ongoing investigation by the United States Attorney's Office. Thus, he asserts, he will be forced to assert his fifth amendment privilege in this action or be forced to expose his defense to the possible criminal action. As a result, the United States Attorney will receive information concerning those defenses that would otherwise be almost totally barred because of the narrow discovery permitted by the F.R. Crim. P.

The federal courts have recognized this dichotomy between civil and criminal discovery rules in a number of cases where the government has successfully sought to stay civil actions when parallel criminal proceedings were taking place, in order to prevent the criminal defendants from discovering the government's case. See *United States v. One 1964 Cadillac*, 41 F.R.D. 352 (S.D.N.Y. 1966); *United States v. Steffes*, 35 F.R.D. 24 (D.Mont. 1964). Similarly, in *Dienstag v. Bronsen*, 49 F.R.D. 327 (S.D.N.Y. 1970), defendants were under indictment for acts underlying the civil action. In order to protect the defendants' rights against self-incrimination, the court stayed further discovery, pending termination of the criminal proceedings. See also *Paul Harrigan & Sons v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D.Pa. 1953); *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D.Mich. 1952).

These cases indicate, defendant claims, that he cannot be forced to choose between his fifth amendment privilege and potential civil liability. No sanction may be imposed, he avers, which makes the exercise of said privilege costly, citing *Spevack v. Klein*, 385 U.S. 511 (1967) (choice between privilege and disbarment or waiver and defense impermissible).

The governing principle, however, is not as broad as defendant asserts. It is true that the direct imposition of sanctions against one who asserts the fifth amendment privilege is impermissible; "a refusal to waive the fifth amendment privilege, standing alone and without regard to other evidence, [which] resulted in loss of employment or opportunity to contract with the state" would impose a constitutionally intolerable sanction. *Baxter v. Palmigiano*, 425 U.S. 308 (1976). However, the exercise of the privilege against self-incrimination may permissibly be encumbered with lesser or more indirect burdens. For example, a party may claim the protection of the fifth amendment during civil proceedings, but the factfinder may draw an adverse inference therefrom. *Baxter, supra.* When parallel criminal and civil/administrative proceedings are pending, the fact that a party has a "free choice to admit, deny or refuse to answer . . . is full vindication of the fifth amendment privilege against self-incrimination." *Luman v. Tanzler*, 411 F.2d 164, 167 (5th Cir. 1969), cert. denied, 396 U.S. 929 (1969). As in *Diebold v. Civil Service Commission of St. Louis County*, 611 F.2d 697 (8th Cir. 1979), the defendant in this case

> is not faced with the decision to surrender either his job or his constitutional privilege against self-incrimination. . . . There exists no requirement that [he] waive his immunity under the fifth amendment. Nor is there a threat that he will be fired simply for invoking the privilege.

Id. at 700-01.

And, as in *United States v. White*, 589 F.2d 1283, 1286 (5th Cir. 1979) (emphasis added), the defendant herein

> was not forced to surrender his privilege against self-incrimination in order to prevent a [civil] judgment against him; although he may have been denied his most effective defense by remaining silent, there is no indication that invocation of the fifth amendment would have *necessarily* [by virtue of state law] resulted in an adverse judgment.

The foregoing cases support the proposition that the Constitution does not generally require a stay of civil proceedings pending the outcome of a parallel criminal action. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C.Cir. 1980) (en banc), cert. denied, 449 U.S. 993 (1980).

This principle is fully in accord with such Supreme Court decisions as *Standard Sanitary Manufacturing Co. v. United States,* 226 U.S. 20 (1912) and *United States v. Kordel,* 397 U.S. 1 (1970). In *Standard Sanitary,* the Court noted, in regard to parallel civil and criminal prosecutions initiated by the government against the same defendants under the Sherman Act:

> The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government; the dependence of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. . . . Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case.

Id. at 52.

The Court thus established that, in such situations, the district court, in its discretion, should weigh the equities of the particular case.

The Court reaffirmed its position in *United States v. Kordel,* 397 U.S. 1 (1970). The FDA had investigated a company and certain of its officers concerning possible violations of the FDCA. An *in rem* action was filed by the United States Attorney seeking civil seizure of products. The FDA filed extensive interrogatories. Before responding, the corporation received notice that the FDA was also considering a criminal proceeding; the corporation therefore moved to stay the civil proceeding or to extend the time for answering the interrogatories until after the criminal proceeding, which was denied. Before receiving the company's answers, the FDA recommended prosecution. After the company filed its answers, the Justice Department, upon recommendation of DHEW, prosecuted and obtained the conviction of the corporation and several of its officers. The Court upheld the lower court's decision. The Court remarked that the government had not brought the civil action "solely to obtain evidence for its criminal prosecution," *id.* at 11-12. The defendants had been given notice of the contemplated criminal action, and were represented by counsel, and had no reasonable fear of prejudice from adverse pretrial publicity. In addition, there were no other "special circumstances" suggesting that the parallel proceedings were improper or unconstitutional. *Id.* at 12.

> The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a government agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

In *Kordel,* the corporation had failed to appoint an agent who could furnish the requested information without fear of self-incrimination, nor had it demonstrated that such a person did not exist, nor did the answering officer claim his fifth amendment privilege. Thus, the Court declined to answer the "troublesome question," *id.* at 9, that would have been presented if no one in that case had been able to answer the interrogatories addressed to the corporation without "subjecting himself to a 'real and appreciable risk of self-incrimination,'" *id.* at 9, and "assumed" that a protective order postponing civil discovery until termination of the criminal action would be the appropriate remedy. However, subsequent lower court decisions have construed *Kordel* broadly, as re-establishing the *Standard Sanitary* balancing test as the correct analytical approach, particularly in light of the Court's comment in a footnote that "[f]ederal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action," 397 U.S. at 12 n. 27.

The Fifth Circuit has employed such a balancing test on numerous occasions. Compare: *Wehling v. Columbia Broadcasting System,* 608 F.2d 1084 (5th Cir. 1979) (civil libel action stayed; protective order promptly sought) with *SEC v. First Financial Group of Texas, Inc.,* 659 F.2d 660 (5th Cir. 1981) (no stay of SEC civil prosecution; defendants sought to exercise blanket privilege), *Hoover v. Knight,* 678 F.2d 578 (5th Cir. 1982) (no stay of administrative hearing on suspension; all "special circumstances" of *Kordel* satisfied) and *United States v. White,* 589 F.2d 1293 (5th Cir. 1979) (no stay; no direct sanctions against exercise of privilege). In *First Financial* the court cogently stated the governing principles:

> There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions. Parallel civil and criminal proceedings instituted by different federal agencies are not uncommon occurrences because of the overlapping nature of federal civil and penal laws. The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions even though it attempts to vindicate several interests simultaneously in different forums. . . . In both [*Kordel*

> and *Standard Sanitary*], the Supreme Court observed that prompt investigation and enforcement both civilly and criminally were sometimes necessary to protect the public interest and that deferring or foregoing either . . . could jeopardize that interest. Accordingly, the Supreme Court declined to create a per se rule . . . .
>
> This principle is fully applicable when the SEC and Justice Department each seek to enforce the federal securities laws through separate civil and criminal actions.

Id. at 666-67.

See also *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973); *Gordon v. Federal Deposit Insurance Corp.*, 427 F.2d 578 (D.C.Cir. 1970).

We concur. Only in "special circumstances" should a district court stay a civil proceeding pending completion of the parallel criminal action. Such special circumstances are absent in the instant case. The defendant has had ample notice of both civil and criminal proceedings; yet he has only now sought a stay of the civil action. He has been represented by the same counsel for more than one year. The Federal Trade Commission has clearly brought this action in good faith; it is not merely seeking to gather evidence for the criminal action. Finally, *defendant has not yet even been indicted,* and, although he remains a subject of investigation, there is no evidence that the government intends imminently to prosecute him. Under these circumstances, the substantial prejudice which both the FTC and the third-party investors would suffer from the extensive delay that defendant seeks, outweighs the interest of defendant in testifying at the civil trial. The Motion for Continuance is therefore denied.

It is Hereby Ordered that:

1) Defendant's Motion for Withdrawal of Admissions is Denied;

2) Plaintiff's Motion To Strike is Granted;

3) Plaintiff's Motion for Partial Summary Judgment is Granted in Part and Denied in Part;

4) Defendant's Motion for Jury Trial is Denied;

5) Defendant's Motion for Continuance of Trial Date is Denied.

[illegible] Court declined to create a per se rule.

The principle is fully applicable when the [illegible]

[illegible]

We [illegible], [illegible] "special circumstances" should a district court stay [illegible] parallel criminal and civil [illegible]

[illegible]

1) Defendant's Motion for Withdrawal of Admissions [illegible]

2) Plaintiff's Motion [illegible] is Granted.

3) [illegible] Summary Judgment [illegible]

4) Defendant's Motion [illegible]

5) [illegible]

BROWN & WILLIAMSON TOBACCO CORP.
v.
FEDERAL TRADE COMMISSION*

No. 82-5594 FTC File No. P81 4511

United States Court of Appeals, Sixth Circuit
October 28, 1982

The Court of Appeals for the Sixth Circuit denied FTC's motion to vacate an injunction entered by district court to maintain the status quo pending appeal of its order dismissing a cigarette manufacturer's complaint for lack of a reviewable agency order. Also denied was FTC's motion in the alternative to modify the injunction so as to permit the agency to publish a modified notice in the *Federal Register* concerning the possible inaccuracy of the "tar" and nicotine figures reported for Barclay cigarettes. Court, however, denied FTC's motion in the alternative without prejudice to the Commission's right to apply to district court for such relief, holding that "a motion to modify an injunction pending appeal must ordinarily be made in the first instance in the district court." Additionally, court directed the clerk to expedite the appeal.

Before LIVELY, KRUPANSKY and WELLFORD, *Circuit Judges.*

Brown and Williamson appeals from the district court's order dismissing the case for lack of a reviewable agency order. The district court entered an injunction pending appeal to maintain the status quo. The FTC moves this Court to vacate the injunction, or, in the alternative, to allow it to publish a modified notice in the Federal Register.

When an appeal is taken from a denial of injunctive relief, the district court has discretion to grant an injunction pending appeal. Rule 62(c), F.R.Civ.P. After an examination of the papers submitted by the parties, we find that the district court did not abuse its discretion when it granted the injunction.

Concerning the FTC's alternate motion, the rule is that a motion to modify an injunction pending appeal must ordinarily be made in the first instance in the district court. Rule 8(a), F.R.A.P. The FTC did not present its modified notice to the district court, so its alternate motion will be denied.

The motion to vacate the injunction is denied. The alternate motion to modify the injunction is denied, without prejudice to the FTC's right to apply to the district court for such relief. The clerk of this court will expedite this appeal.

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*Not otherwise reported; *reh. denied* May 17, 1983.

DONALD L. BACHMAN, et al.
v.
JAMES C. MILLER III*

Civ. A. No. 76-0079, 99-292

United States District Court, District of Columbia
November 3, 1982

1. **Individual members of class action were not denied constitutional right to have their discrimination claims heard by an Article III judge by portion of settlement agreement which made United States Magistrate's rulings on discrimination claims final and unappealable.**

That portion of class action employment discrimination settlement agreement whereby individual member could submit a claim to settlement administrator and, if unsatisfied, could appeal decision to United States magistrate, whose decision would be final and unappealable, was not infirm as denying individual members a constitutional right to have their claims heard by an Article III judge.

2. **Individual class members claiming lack of notice were practicing in the area at the time notice of settlement was mailed to approximately 25,000 to 35,000 known class members and published in a number of newspapers and journals and they were bound by settlement agreement.**

Settlement of employment discrimination suit was binding on individual class members where notice was mailed to all known plaintiffs and published in a number of newspapers and journals for three weeks and class size consisted of group of approximately 25,000 to 35,000 members, settlement received considerable press coverage and class members claiming lack of notice **[151]** were practicing in the area at time of settlement.

Three members of class represented in employment discrimination suit moved to vacate portion of settlement agreement making magistrate's decision on individual claims unappealable. The District Court, Charles R. Richey, J., held that: (1) procedure for individual claims was not infirm as denying individual class members their constitutional right to have claims heard by an Article III judge, and (2) settlement was binding on movants as there was adequate notice.

Motion denied.

(*Syllabus, with substituted captions, taken from 559 F.Supp. 150)*)

Roderic V.O. Boggs, Roger E. Warin, Washington, D.C., for plaintiffs.
John Oliver Birch, Asst. U.S. Atty., Washington, D.C., for defendant.

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*Reported in 559 F.Supp. 150 (1982); *reh. denied* March 29, 1982; *reh. denied* May 14, 1984.

MEMORANDUM OPINION

RICHEY, *District Judge.*

BACKGROUND

The case of *Bachman v. Pertschuk*[1] resulted in the most far reaching affirmative action program ever developed for professional people. Before this Court, plaintiffs, minority professional persons, sought to vindicate themselves from perceived discrimination at the Federal Trade Commission ("FTC"). The matter was resolved in the form of a settlement agreement that was approved by the Court on April 25, 1978.

The settlement agreement[2] provided for a broad plan to ensure against discrimination at the FTC in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. The settlement also provided a post-settlement procedure for resolution of individual claims. Any class member who believed himself or herself to be the victim of discrimination could submit a claim to the Administrator of the settlement who was empowered to grant relief. If the claimant remained unsatisfied, she/he could appeal the Administrator's decision to a United States Magistrate. By consent of parties and in full compliance with the notice and comment requirement of Rule 23 of the Federal Rules of Civil Procedure the decision of the Magistrate was to be the final and unappealable disposition of the claim.

This matter is before the Court on the motion of three members of the plaintiff class ("Movants") to vacate the portion of the settlement agreement making the Magistrate's decision unappealable.[3] Movants aver that this portion of the settlement should be vacated because it denies them their constitutional right to have their claims heard by an Article III Judge, which right they claim was neither waived nor waivable. Movants further allege that they did not receive adequate notice. They thus conclude that this Court has a "right and a duty" to vacate the no-appeals clause of the settlement under both the agreement itself and Fed.R.Civ.P. 60(b). The Court does not find merit in Movants' arguments and for the reasons set forth herein will deny Movants' Motion.[4]

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[1] The name was changed to *Bachman v. Miller* when James Miller replaced Michael Pertschuk as head of the FTC.

[2] The Settlement Stipulation and Order approved by this Court on April 25, 1978 is attached hereto and incorporated herein for convenient reference. [Omitted from published opinion, *see* 12 C.D. 45 at 46—Editor.]

[3] Movants are 3 Black attorneys—Wanda Foster, Dalton Howard and Terrence Willingham—who applied for positions with the FTC but were not hired.

[4] Movants first attempted to appeal directly to the Court of Appeals for the District of Columbia Circuit. That Court rejected their claim finding that it was not properly before the Court. *Bachman v. Pertschuk*, No. 81-1906 (D.C.Cir., Feb. 16, 1982) (Mem.) [16 C.D. 57].

ANALYSIS

Point I

MOVANTS WERE NOT DENIED THE RIGHT TO AN ARTICLE III FORUM

[1] Movants first allege that they have an unwaivable right to have their claims of discrimination heard by an Article III Judge. They aver that the claims procedure established by the settlement agreement denies them this right because it makes the Magistrate's ruling final and unappealable. However, this argument misapprehends the purpose of the settlement agreement and the post-settlement claims process that it establishes. **[152]**

On July 29, 1976 this Court certified a class consisting of a large group of individuals who alleged that they had been discriminated against by the FTC. Movants were clearly within the class certified by this Court. Thus, any claim of discrimination that they had against the FTC was disposed of in the final resolution of this case. That final resolution came in the form of a settlement agreement.[5] *See Gendron v. Shastina Properties Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1979) (settlement constitutes final disposition of the case). From the time of the approval of the settlement by this Court, any claim of discrimination Movants may have had against the FTC was *res judicata*—the settlement agreement itself finally disposed of Movants' claims.

To ensure that each individual would have an opportunity to be heard, the settlement agreement provided an *additional* remedy—an individual claims procedure.[6] Movants each filed a claim under this procedure with the Administrator of the settlement. Upon denial of their claims, they appealed to a United States Magistrate (as the stipulation provided) who also found that their claims lacked merit. When Movants brought their claims before the Administrator and then the Magistrate, their requests for relief arose under the settlement agreement. Their claims were no longer Title VII claims because the Movants' rights under Title VII were fully and finally resolved in the settlement agreement, entered into in an Article III forum and approved by an Article III Court. Thus, Movants' allegation that they have a right to have their additional individual claims heard by an Article

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[5] The settlement became final and unappealable when no appeal was taken within the 60 day period provided by Rule 4(a) Fed.R.App.P. *See Browder v. Director, Department of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978) (time period for appeal is jurisdictional).

[6] If the settlement had provided that each plaintiff was entitled to receive $5, that provision would have constituted a final disposition of Movants' claims and they could not be heard to complain that they were denied their right to an Article III forum. Here, each plaintiff was given an extra opportunity to assert an individual claim. This opportunity was not in contravention of their constitutional rights. In fact, they had already received everything to which they were constitutionally entitled. Rather, this opportunity was additional relief provided by the consent of the parties.

III Judge must fail and it is unnecessary for the Court to consider whether such a right is waivable or was waived by Movants here.[7]

Point II

ADEQUATE NOTICE WAS PROVIDED TO MOVANTS AS MEMBERS OF THE PLAINTIFF CLASS

[2] Movants also argue that they did not receive adequate notice and thus were not aware that when they submitted their claim to the Administrator they could not appeal to an Article III Court.[8] Although this allegation appears in the context of Movants' argument that there could be no waiver of their rights to an Article III Judge because they were not under notice, the Court will address the issue in its own right because it goes to the heart of the question of whether Movants should properly be bound by the settlement agreement.

On January 17, 1978 this Court conditionally approved the settlement agreement submitted by the parties in *Bachman*. On [153] February 2, 1978 the Court ordered that notice of the proposed settlement and its terms be disseminated to the plaintiff class. Pursuant to this Order, notice was mailed to all known plaintiffs. Additionally, notice was published in a number of newspapers and journals for a period of weeks in an attempt to notify class members that the Court recognized "may be difficult to identify and/or locate (*e.g.*, rejected applicants)."

Notice to the class was provided pursuant to Fed.R.Civ.P. 23(e). Rule 23(e) provides that notice of a proposed "compromise shall be given to all members of the class in such a manner as the Court directs." By its terms, Rule 23(e) vests broad discretion in the court to determine what constitutes adequate notice. *See* C. Wright & A. Miller, Federal Practice & Procedure § 1799 at 237. Moreover, publication has been widely recognized as a proper method of notice for class members who cannot reasonably be individually identified and/or located.[9] *See e.g., Mendoza v. United States,*

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[7] Movants' request that the Court set aside a "portion" of the settlement would deprive defendant nearly completely of the benefit it hoped to achieve through class settlement—release from the expense of defending against, and potential liability in, numerous individual suits over a long period of years at great expense to the litigants and the Judiciary and its inadequate resources. To do as plaintiffs urge would bring about a greatly disfavored result since it is widely recognized that settlement, especially of Title VII suits, is to be encouraged. *See Carson v. American Brands,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998 n. 14, 67 L.Ed.2d 59 (1981).

[8] The Court is not entirely convinced that Movants, all practicing attorneys, could reasonably have assumed that they were free to fully utilize the claims procedure provided in the settlement and then pursue their claims further to an Article III forum if they were dissatisfied with the result. It would be a strange class settlement indeed that purported to resolve the issues presented and yet allowed each individual class member to pursue a separate suit.

[9] Movants were among a group of approximately 25,000 to 35,000 individuals who unsuccessfully applied for positions as attorneys with the FTC. Given the size of this group it is not difficult to understand why Movants were not individually identified and noticed.

Additionally, the Court notes that publication was a method of notice particularly well suited to bringing this matter to Movants' attention because all of them were practicing attorneys in the Washington area at the time of the settlement. In addition to the published notices, the settlement received considerable press coverage which further increased the likelihood that Movants would be, or were alerted to the fact of the settlement.

623 F.2d 1338, 1351 (9th Cir. 1980) *cert. denied,* 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981); *Luevano v. Campbell,* 93 F.R.D. 68 (D.D.C. 1981); *Quigley v. Braniff Airways, Inc.,* 85 F.R.D. 74, 77 (N.D. Tex. 1979). Thus, the Court concludes that adequate notice was provided to the plaintiff class and the FTC did not "default in providing movants with proper notice," as Movants allege.

In light of the Court's rejection of Movants' claims, it is unnecessary to consider whether the Court has the power to grant Movants the relief they requested either under the terms of the settlement agreement or Fed.R.Civ.P. 60(b).

An Order consistent with foregoing will be issued of even date herewith.

[illegible] F.2d 1106, 1121 (9th Cir. 1990), [illegible] denied, 497 U.S. [illegible] 1331, [illegible] L.Ed.2d [illegible] (1991); [illegible] v. [illegible], 937 F.2d [illegible] (D.C. Cir. 1991); [illegible] v. [illegible], [illegible]. Thus, the Court concludes that since the notice was not [illegible] to the plaintiff class and the FTC did not "defeat or preclude [illegible] with others," [illegible]

In light of the Court's rejection of [illegible], it is unnecessary to consider whether the Court has the power to grant [illegible]

[illegible]

MONTGOMERY WARD & CO., INCORPORATED
v.
FEDERAL TRADE COMMISSION*

No. 81-7421 FTC Docket No. 9117

United States Court of Appeals, Ninth Circuit
November 9, 1982

1. **Substantial evidence supported factual findings of FTC order that retailer had not provided consumers with warranty information as required by FTC's presale rule.**

Federal Trade Commission's factual findings in support of its order that retail seller was not in compliance with FTC's presale rule regarding seller's duty to supply warranty information to consumers were supported by substantial evidence.

2. **If abused, FTC discretion to proceed by adjudication or rulemaking is subject to judicial review.**

Grant of discretion to agency to proceed by adjudication or rule making does not preclude judicial review when that discretion has been abused.

3. **Where the retroactive impact of clarification is not excessive or unwarranted, an administrative agency presented with a new problem may act through adjudication to clarify an uncertain area of the law.**

When new problem is presented to administrative agency, agency may act through adjudication to clarify uncertain area of the law, so long as retroactive impact of clarification is not excessive or unwarranted.

4. **Agency may provide an interpretation of rule's requirements relative to particular factual circumstances in an adjudication, but should the restatement so change requirements of the rule that regulated party has inadequate notice of required conduct, adjudicatory statement becomes an amendment.**

Adjudication allows agency to apply rule to particular factual circumstances and to provide interpretation of required conduct in light of those circumstances but adjudicatory statement of rule becomes an amendment if the statement so alters requirements of rule that regulated party has inadequate notice of required conduct.

5. **Only where affected parties are provided with adequate notice in accordance with appropriate rulemaking procedures is amendment to the rule proper.**

Amendment to rule is proper only when adequate notice is provided affected parties by agency pursuant to appropriate rule-making procedures.

6. **Court must consider in part the extent to which the standards applied in an adjudication differ from clear language of rule and agency's prior use of rulemaking to determine whether agency abused its discretion by choosing to proceed by adjudication.**

To determine if choice of procedure made by agency in proceeding by adjudication was an abuse of discretion, court looks in part to extent that standards applied in adjudication vary from plain language of rule and also looks at agency's prior use of rule making.

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*Reported in 691 F.2d 1322 (1982). For case before the Commission, see 97 F.T.C. 363.

7. **FTC reasonably made a distinction between small and large retailers in defining presale rule provision requiring that warranty binders be made available to consumers in each sales department selling warranted items or in a location providing ready access to the binders.**

Distinction between large and small retailers was reasonably made by Federal Trade Commission in defining more specifically what was required of retail seller by FTC's presale rule under binder option which requires that warranty binders be made available in each department selling covered products or in a location providing "ready access" to the binders, especially since seller was significantly involved in rule-making process.

8. **FTC did not abuse its discretion in determining that presale rule's binder option requiring that consumers be provided with "ready access" to warranty binders meant that large stores had to make warranty binders available on each selling floor.**

Federal Trade Commission's decision that ready access to warranty binders for large stores, for purposes of FTC's presale rule binder option, which requires that warranty binders be made available in each department selling covered products or in location providing ready access to binders, meant that one set of binders had to be available on each selling floor was not an abuse of discretion.

9. **FTC decision requiring that signs concerning availability of warranty binders be placed in each department selling the warranted products was an abuse of discretion, since it was contrary to express language of the presale rule.**

Federal Trade Commission's decision that required signs concerning availability [1324] of warranty binders to be placed in each department selling products covered by presale rule, which under binder option requires that warranty binders be made available in each department or in location providing ready access to binders, was contrary to rule's express language and was therefore an abuse of discretion.

10. **Since retailer would be placed at a serious competitive disadvantage because of its prior conduct, interpretation of presale rule as requiring ready access to warranty binders by having at least one set placed on each sales floor, could not be applied retroactively to retailer.**

Federal Trade Commission's presale rule, as interpreted to require retail seller to provide customers with ready access to warranty binders by placing at least one set of binders on each sales floor, could not be applied retroactively to retail seller, which otherwise would be placed at serious disadvantage compared to its competitors because of its conduct prior to articulation of one-per-floor standard.

On petition for review of order of the Federal Trade Commission based on ruling [1323] that retail seller violated presale rule by failing to provide potential customers with ready access to written warranty information, the Court of Appeals, Hug, Circuit Judge, held that: (1) FTC's interpretation of its presale rule as requiring retail seller to provide customers with ready access to warranty binders by placing at least one set of binders on each sales floor was within its discretion, insofar as interpretation applied prospectively, but (2) FTC's order requiring that signs concerning availability of binders be placed in each department was contrary to express language of rule.

Cease and desist order vacated.

(*Syllabus, with substituted captions, taken from 691 F.2d 1322*)

Newton N. Minow, Sidley & Austin, Chicago, Ill., for petitioner.

Linda A. Heary and *Jerold D. Cummins,* F.T.C., Washington, D.C., for respondent.

Before Kilkenny and Hug, *Circuit Judges,* and Brown,* *District Judge.*

Hug, *Circuit Judge*:

Montgomery Ward & Co., Incorporated ("Wards") appeals a Federal Trade Commission ("Commission" or "FTC")[1] ruling that Wards violated 16 C.F.R. § 702.3 (1982) by failing to provide potential customers with ready access to written warranty information prior to the sale of merchandise priced at over fifteen dollars. As a result of its ruling, the Commission entered a cease and desist order enjoining Wards from further violations.

On appeal, Wards argues that the Commission's ruling is not based on substantial evidence, that the ruling is an abuse of discretion because it calls for a standard of conduct that is markedly different from the language of the regulation, that the entry of a cease and desist order is inappropriate, and that the order is too vague to be enforceable.

I

FACTS

Wards is a chain of approximately 650 retail department and catalog stores. As a retail seller, Wards is affected by the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12 (the "Act"), which provides, in part, that the FTC "prescribe rules requiring that the terms of any written warranty . . . be made available to the consumer (or prospective consumer) prior to the sale of the product. . . ." 15 U.S.C. § 2302(b)(1)(A).

Using that grant of authority, the FTC promulgated the pre-sale availability rule ("pre-sale rule" or the "rule"), which appears at 16 C.F.R. § 702.3.[2]

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*The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

[1] For clarity's sake, the Federal Trade Commission for most purposes is labeled "the FTC." In its function as an appeal board, however, it is referred to as "the Commission."

[2] 16 C.F.R. § 702.3 reads, in pertinent part:

The following requirements apply to consumer products actually costing the consumer more than $15.00:

(a) *Duties of the seller*. Except as provided in paragraphs (c) through (d) of this section, the seller of a consumer product with a written warranty shall:

(1) Make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

(footnote continued)

The pre-sale [1325] rule provides sellers with four alternative methods to make warranty information available to consumers. Wards decided to use the method set out at section 702.3(a)(1)(ii), the binder option.[3]

In an effort to meet the requirements of the binder option, Wards's management developed a program of warranty binder distribution and maintenance, which was implemented shortly before the January 1, 1977 effective date of the pre-sale rule. In addition to normal management oversight, Wards included compliance with the warranty binder program as part of its internal auditing procedure.

To implement its binder program, Wards delivered three sets of binders and from two to eight informational signs (depending on store size) to each store during November, 1976. Over the next three months, an additonal 1,100 signs were sent to the stores upon individual requests. The store managers were instructed to place signs at the location of the binders and in prominent areas in the appliance department, the main entrance/exit of the store, and near escalators or elevators. The binders were to be placed at the Customer Accommodation Center (an information and service desk), in the automotive department (often a separate building), and at a third location on a floor not already containing a binder. The specific location was left to the store manager's discretion because of lack of uniformity in store layouts.

Toward the end of 1977, FTC investigators surveyed a number of Wards's stores to check compliance with the rule. Numerous violations were found, including the failure to post signs, the failure to have the binders available upon request, and the failure of employees to direct questioning customers to the binders.[4]

(footnote continued from previous page)

(i) Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(ii) Maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate. The seller shall either:

(A) Display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

(B) Make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

(iii) Displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(iv) Placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies;

(2) Not remove or obscure any warranty disclosure materials provided by a warrantor, except:

(i) Where such removal is necessary for store window displays, fashion shows, or picture taking; or

(ii) Where the seller otherwise, through means provided for in paragraph (a)(l) of this section, makes the terms of the warranty information available to the consumer.

[3] The rule does not require a seller to use only one of the four options. The only requirement is that, for each covered product sold, at least one of the four allowed methods must be used. It is logical to expect most sellers, as a matter of administrative efficiency, to rely on one method to the exclusion of others.

[4] Although expressly not relied upon by the Commission in reaching its final decision, Wards's own audits indicated violations of its corporate compliance program.

In February, 1978, the FTC informed Wards that it was not in full compliance with the pre-sale rule. In response, Wards repeated its initial sign distribution, stepped up the priority of compliance on its internal audit schedule, and sent additional memos to its store managers emphasizing the im**[1326]**portance of compliance with the rule. In addition, Wards introduced a new sign program in June, 1978, involving the distribution of ten to twenty-five signs per store, to be affixed to cash registers in areas where covered products were sold.

Despite these efforts, the FTC believed Wards's compliance to be insufficient. In September, 1978, it issued a complaint alleging that Wards had failed to make written warranty materials available to consumers prior to sale, in violation of the Act and the pre-sale rule.[5]

II

THE DECISION BELOW

After extensive hearings, an administrative law judge ("ALJ"), on December 19, 1979, held Wards to be in violation of the rule and the Act, and issued a cease and desist order. Both parties appealed to the Commission, which, after modification, affirmed the ALJ's order on April 30, 1981.

A. *Ready Access to Warranty Binders.*

The Act requires that written warranty terms be made available to consumers and potential consumers prior to the sale of covered products. 15 U.S.C. § 2302(b)(1)(A). The pre-sale rule, under the binder option, requires that warranty binders be made available in each department selling covered products, "or in a location [providing] ready access" to the binders. 16 C.F.R. § 702.3(a)(l)(ii) (fully set out at footnote 2, *supra.*).

The FTC, in the proceedings below, urged that this section means that a binder must be placed in every department selling covered goods. The ALJ rejected the FTC's position as contrary to the language of the regulation. Indeed, as the Commission noted in its decision, the FTC's interpretation had been expressly rejected during the rulemaking proceedings leading to the promulgation of the pre-sale rule. *See* 40 Fed.Reg. 60,168, at 60,183 (1975).[6]

The ALJ and the Commission agreed that providing prospective consumers with ready access to the warranty binders requires, for large retailers, that one set of binders must be available on each selling floor. Wards was held to be in violation of this requirement and was ordered to comply.

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[5] The FTC's complaint also alleged, in a separate count, that Wards had failed to provide sufficient warranty information to its stores. At the administrative hearing, however, no proof was offered on those charges. The count was later dismissed.

[6] Even if the FTC's reading of the rule had not been rejected previously, we would not be able to adopt it, as it would vitiate the alternative nature of the rule by making meaningless the language after the "or."

B. *Location of Signs.*

The binder option also requires a seller to provide notice of the availability of the binders by placing "signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department. . . ." 16 C.F.R. § 702.3(a)(l)(ii)(B). The ALJ focused on the "reasonably calculated" language and concluded that signs are required in reasonable proximity to the point of sale.

The ALJ based his proximity conclusion on an analysis of the other three compliance options. He noted that all three have some explicit proximity or "point of sale" requirement. *See* footnote 2, *supra*. He concluded, therefore, that the "reasonably calculated" language, when read in the context of the other options, means that the signs must be "in sufficient proximity to the point of sale so that buyers are likely to see such notice before making their purchases." The ALJ's order requires Wards to place signs on all cash registers in departments selling goods covered by the rule. He reasoned that signs in such prominent locations at the point of sale would be an excellent way to elicit the prospective buyer's attention.

The FTC argued that the signs should be near the products, as opposed to the point of sale. The ALJ rejected that approach, noting that the purpose of the rule is to make warranty terms available prior to the **[1327]** sale. He concluded that the rule makes no requirement that the signs or binders be visible to the prospective buyer during examination of the product.

The Commission rejected the ALJ's analysis, with the observation that by the time a customer approaches the cash register, the purchasing decision usually already has been made; thus the notification is no longer presale, and the purpose of the rule is not accomplished. The Commission ordered that, if Wards put one set of binders on each floor rather than in each department, it must place signs "in a *prominent location in each department* of each retail establishment where warranted products are sold, in a manner reasonably calculated to elicit the prospective buyer's attention. If two adjacent departments share a wall, one sign may be placed on that wall." (Emphasis added).[7]

III

DISCUSSION

A. *Substantial Evidence.*

[1] The Federal Trade Commission Act, at 15 U.S.C. § 45(c), states that "findings of the Commission as to the facts, if supported by evidence, shall

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[7] Compare the emphasized language in the Commission's order with the language of the rule: "prominent locations in the store or department. . . ." 16 C.F.R. § 702.3(a)(l)(ii)(B).

be conclusive." This language has been judicially interpreted to mean that the FTC's findings of fact are to stand inviolate on review if supported by substantial evidence. *Ash Grove Cement Co. v. FTC,* 577 F.2d 1368, 1377-78 (9th Cir.), *cert. denied,* 439 U.S. 982, 99 S.Ct. 571, 58 L.Ed.2d 653 (1978). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966).

Wards contends that the Commission's conclusion that it was not in compliance with the pre-sale rule is not supported by substantial evidence. The FTC presented a large amount of testimony from its investigators that showed violations of both the sign placement and binder availability requirements. The crux of Wards's position seems to be that the Commission erred in crediting the investigator's testimony over the rebuttal evidence Wards presented.

As the Fifth Circuit once indicated, substantial evidence to support an agency finding of fact may exist "even though suggested alternative conclusions may be equally or even more reasonable and persuasive." *Colonial Stores, Inc. v. FTC,* 450 F.2d 733, 739 (5th Cir. 1971) (adopted by this court in *Ash Grove,* 577 F.2d at 1378). Thus, while we acknowledge that the evidence presented by Wards did, in some instances, persuasively rebut the FTC's showing of violations, we are satisfied that the Commission's factual findings were supported by substantial evidence.

Our conclusion, however, is tempered by the problems presented by the remaining issues in this appeal. We are sympathetic to Wards's observation that its substantial evidence argument is hampered by the fact that it was presenting evidence of its good faith compliance with the plain language of the pre-sale rule, while the FTC was demonstrating that Wards was in violation of a new version of the rule that never before had been stated.[8] Because of our ultimate conclusion in this case, we do not address the question whether Wards's efforts to comply with the express terms of the rule were successful.

B. *The Standard of Conduct—Interpretation v. Amendment.*

Wards contends that the Commission's decision was not the mere fleshing out of a general rule through its application to specific facts. Wards urges that the Commission has instead fashioned a new rule and retroactively applied it, thus invalidating **[1328]** Wards's efforts to comply with the old one. Wards contends that creation of a new rule is proper only through formal rule-making procedures, and that the Commission's decision, therefore, was an abuse of discretion.[9]

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[8] The FTC acknowledged this problem in a footnote to its brief, discussing the admissibility of Wards's internal audit records: "the [FTC's] investigators were not necessarily checking the same things as [Wards's] auditors . . . ."

1. *Judicial Review*

[2] It is well settled that the decision whether to proceed by adjudication or rule-making "lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 134 (1974). Such a grant of discretion, however, does not preclude judicial review when that discretion has been abused. The "scope of review" section of the Administrative Procedure Act requires that a reviewing court "set aside agency action . . . found to be . . . arbitrary, capricious, [or] an abuse of discretion . . . ." 5 U.S.C. § 706(2)(A). *See Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission*, 681 F.2d 1189, 1192 (9th Cir. 1982) (Applying section 706(2)(A)). We must decide, therefore, whether the Commission's decision amended the pre-sale rule in such a way that the use of adjudication to achieve that end constituted an abuse of discretion.

2. *Developing the Law Through Adjudication*

The Supreme Court has consistently ruled that new administrative policy may be announced and implemented through adjudication. In *SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947), the Court noted:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

Chenery involved securities trading by management during the reorganization of a public utility holding company. The SEC's order restricted management's ability to profit from its trading. The defendants protested that the SEC's adjudicatory decision had invented a new standard of conduct and retroactively applied it to their detriment. The Court, however, rejected their position:

> [W]e refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first im-

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[9] The procedures for rulemaking and adjudication by administrative agencies are set out in the Administrative Procedure Act 5 U.S.C. §§ 553 and 554, respectively. Section 553 is slightly modified by the rule-making authorization section of the Act. 15 U.S.C. § 2309.

> pression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Chenery, 332 U.S. at 203, 67 S.Ct. at 1580-81 (citations omitted).

[3] Thus, when a new problem is presented to an administrative agency, the agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted.

While the general policy considerations raised in *Chenery* are fundamental to an analysis of the propriety of an agency's adjudicatory lawmaking, its result is not controlling. The case at hand does not involve the filling of a void in the law. Here, a rule, describing in some detail the required conduct, recently had been promul**[1329]**gated, and Wards arguably had acted in reliance on the plain meaning of that rule. This case involves an adjudicatory restatement of previously articulated law.

While the Supreme Court has addressed adjudicatory changes in administrative case law,[10] and adjudicatory interpretations of "law" developed in administrative manuals,[11] we have not been directed to, nor does there appear to be, any case where the Court has addressed an adjudicatory change in a recently promulgated rule.

3. *Changing Rules Through Adjudication*

[4, 5] The issue is whether an adjudicatory restatement of the conduct required by a rule is an interpretation or an amendment of the rule. Adjudication allows an agency to apply a rule to particular factual circumstances and to provide an interpretation of the required conduct in light of those circumstances. An adjudicatory restatement of the rule becomes an amendment, however, if the restatement so alters the requirements of the rule that the regulated party had inadequate notice of the required conduct.[12] An amendment is proper only when adequate notice is provided to affected parties pursuant to appropriate rulemaking procedures. *See* 5 U.S.C. § 553 (rule-making as required by the Administrative Procedure Act); *Ruangswang v. INS*, 591 F.2d 39, 45 (9th Cir. 1978) (adjudication of a new requirement into a regulation held to be an abuse of discretion because of lack of notice).

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[10] *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285-87 & n.14, 294, 94 S.Ct. 1757, 1767-68, & n. 14, 1771, 40 L.Ed.2d 134 (1974) (reversal of long-held policy that buyers are management is affirmed because of inherently factual nature of the determination). For a general discussion of the significance of reviewing rules as opposed to adjudicatory decisions, *see* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U.Pa.L.Rev. 485, 526-27 (1970), hereinafter "Robinson."

[11] *See Morton v. Ruiz*, 415 U.S. 199, 231-38, 94 S.Ct. 1055, 1072-76, 39 L.Ed.2d 270 (1974) (no deference given to agency decision based on statutory interpretation appearing in BIA internal operations manual). We addressed the same issue in a different context in *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir. 1981) (Social Security Claims Manual entitled to no deference).

[12] *See generally*, Robinson, 118 U.Pa.L.Rev. at 514.

[6] Thus, to determine if the choice of procedure made by the agency was an abuse of discretion, we look, in part, to the extent that the standards applied in the adjudication vary from the plain language of the rule. *Ruangswang,* 591 F.2d at 43; *see NLRB v. St. Francis Hospital of Lynwood,* 601 F.2d 404, 414 (9th Cir. 1979) (NLRB policy, announced in adjudication, inconsistent with congressional purpose). We also look at the agency's prior use of rule-making and the current adjudication to see if the agency's conduct in the latter is consistent with the proceedings in the former. In *Patel v. INS,* 638 F.2d 1199 (9th Cir. 1980), we noted that "by adjudication, the Board attempted to add a requirement to the 1973 regulation which had been expressly discarded during its rule-making proceedings." *Patel,* 638 F.2d at 1202 (footnote omitted). That inconsistent behavior by the INS was significant in our decision to reverse the agency's ruling on the requirements of the regulation at issue there.[13]

C. *Ready Access.*

[7] In the case before us, the ALJ and the Commission agreed that ready access to **[1330]** the warranty binders, for large stores, means that one set of binders must be available on each selling floor. Wards argues that even if the distinction between large and small retailers is proper, it should have been included in the language of the rule.

We believe that such a distinction is a reasonable step by the Commission to define more specifically what ready access requires of Wards.[14] It seems clearly within the agency's discretion to make efforts to define ready access in terms of store size. The use of store size as a factor for consideration was presaged in the commentary published in the Federal Register upon the promulgation of the presale rule. 40 Fed.Reg. 60,168, 60,184 (1975).[15]

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[13] The same factor was significant in our recent decision in *Ford Motor Co. v. FTC,* 673 F.2d 1008 (9th Cir. 1981) (agency concurrently pursuing rulemaking change in required standard of conduct). Professor Davis, while critical of the *Ford* decision, acknowledges that a contemporaneous rule-making proceeding is a significant factor supporting the result in *Ford.* Davis, *Administrative Law Treatise,* § 7.25 at 183 (2d ed. Supp. 1982), hereinafter "Davis." Davis's criticism of our decision in *Ruangswang* and *Patel* seems to be based on an inadequate recognition of the facts and history relevant to those cases. *Compare Patel,* 638 F.2d at 1201-03, with Davis, § 7.25 at 179-80 (2d ed. Supp. 1982).

[14] Wards's concern seems to be based on a misapprehension of what the Commission means by "large retailer." Clearly that is a reference to individual store size rather than corporate size. It would, of course, be nonsensical to require different standards of two different stores of identical physical size, merely becaue one is part of a two-store chain while the other is part of a two-hundred-store chain. Such a distinction would be meaningless in terms of a consumer's ready access to warranty binders.

[15] The relevant portion of the commentary reads:

> This sub-paragraph requires that the binders be maintained either in the department where the warranted product is sold, or in a location which provides the prospective buyer with ready access to the binders. Gambles, in its written submission, noted that "(w)hile the provision that binders be kept on a departmental basis is reasonable in the case of large retail outlets where it would be a burden on the customer to require that he or she go to one specific location in the store to find the binders, there are many small retail outlets which may have merchandise laid out by department, yet are small enough so that one complete set at a single location in the store would suffice."
>
> Thus, in such instances, it would be permissible to place the binders in a location other than in the departments in which the products are being sold.

40 Fed.Reg. at 60,184. We look to the above-quoted material because "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids it use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543-44, 60 S.Ct. 1059, 1063-64, 84 L.Ed. 1345 (1940) (footnotes omitted).

As Wards was significantly involved in the rule-making process, it would be unreasonable, to conclude that it was unaware of the considerations that went into the development of the rule in its ultimate form.

[8] There are two troubling aspects, however, to this portion of the Commission's decision. The first is that the FTC urged both the ALJ and the Commission to require that Wards maintain a set of binders in each department. This requirement was specifically proposed and rejected in the rule-making process. *See* 40 Fed.Reg. at 60,183-84. It is disconcerting that the FTC would seek to enforce a version of the pre-sale rule that was rejected in the promulgation of the final rule.

However, this case is different from *Patel,* where we reversed the agency's appeal board after it had enforced the previously rejected standard. *See Patel v. INS,* 638 F.2d at 1202. Here, the Commission rejected the inappropriate position presented by the FTC, and applied a bright-line standard for the implementation of the ready access requirement.

The second troubling aspect of the Commission's decision is that we are not given any indication as to how that bright-line standard evolved. In the ALJ's opinion, affirmed by the Commission, there appears only the statement: "It is clear, however, that requiring consumers to go from one floor to another to examine [warranty] materials would constitute an excessive burden."

We are not informed why it is less trouble to cross a 50,000 square foot sales floor to get a warranty binder, than it is to ride up or down an elevator or escalator. It would seem that location on the floor, relative to an elevator or escalator, would be significant. No mention of this was made, however, and we are urged by the FTC to defer to its administrative expertise in resolving the issue. *See Pacific Coast Medi*[1331]*cal Enterprises v. Harris,* 633 F.2d 123, 131 (9th Cir. 1980). Such deference, however, is best used to resolve definitional problems. *See Todd Shipyards Corp. v. Secretary of Labor,* 566 F.2d 1327, 1331 (9th Cir. 1977) (defer to administrative expertise on whether a rule relating to openings flush with the deck applies to a manhole with a six-inch-high coaming). Here we are instead dealing with a determination of how consumers will react upon discovering that a copy of a warranty may only be found on another floor.

While we do not disagree with the premise that the FTC has some expertise in consumer transactions, we would expect some indication of the source of the agency's knowledge. We have been shown no prior adjudications and no empirical analysis. The term "ready access" was apparently introduced into the rule after many retail sellers commented that a requirement of a binder in every department, as proposed by the FTC, would not be flexible enough to apply to all retail stores. 40 Fed.Reg. at 60,183-84. There does not appear to have been any discussion on what "ready access" means. *Id.*

In conclusion, however, although we are troubled by the untenable position taken by the FTC before both the ALJ and the Commission, and by the rather arbitrary decision that one set of binders is required on each sales floor in large stores, we believe that the Commission's decision was within the scope of its discretion. We hold that the Commission decision that ready access requires Wards to place one set of binders on each sales floor was not an abuse of discretion.

D. *Sign Placement*

[9] The second major element of the Commission's decision is that Wards was ordered to place signs "in a prominent location in each department" selling products covered by the rule. Wards argues that this requirement is inconsistent with any reasonable reading of the rule, which calls for signs in "prominent locations in the store or department . . . ." 16 C.F.R. § 702.3(a)(l)(ii)(B).

On this issue, the agency's commentary in the Federal Register is unenlightening. We are told only that if the warranty binders are kept at a central location, then "a prominent notice or series of notices must alert the prospective buyer's attention to the existence of the binders and the means for obtaining access to them." 40 Fed.Reg. at 60,184. We can find no basis for the Commission's conclusion that the rule requires a sign in each department.

The situation we face here is similar to one recently resolved by the Temporary Emergency Court of Appeals in *Tenneco Oil Co. v. Federal Energy Administration,* 613 F.2d 298 (Em.App. 1979). *Tenneco* involved the definition of oil "produced and sold" as it related to calculating a base period quantity for price regulation. Tenneco had produced oil at the relevant wells during the relevant period, but had sold only part of the production. The remainder was retained for the company's own use in steam generators. *Id.,* at 299-300.

The FEA found that Tenneco had improperly priced its later oil sales because it had not counted the oil it used on site as "produced and sold." The agency concluded that "sold" implies value received and that Tenneco received in-kind value through the consumption of its oil. Therefore, despite the fact that no change in title occurred, the oil used on site was "produced and sold." *See id.* at 301.

The court noted that an agency interpretation of its own rule is normally entitled to great deference.[16] However, where the interpretation ignores the commonly understood meanings of the words in the rule, closer review is required. *See id.* at 302. The court concluded that "[t]o hold that a 'sale' may occur simply in the receipt of value from property would be to rob from **[1332]** the term any legal or economic significance." *Id.* (citations omitted.)

The court acknowledged that a literal interpretation of ambiguous language may be avoided if such an interpretation would be contrary to the rule's purpose. "However, the language of the regulations must reasonably bear the intended meaning. A court cannot put its imprimatur on a regulation that was intended but never enacted." *Id.* at 303 (citations omitted.) The court found no help in the history of the regulation, as the contrary interpretations of that history offered by the parties were "equally tenable." *Id.*

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[16] *See Udall v. Tallman,* 380 U.S. 1, 4, 16-18, 85 S.Ct. 792, 795, 801-02, 13 L.Ed.2d 616 (1965).

In concluding that it could not enforce the FEA's interpretation of "produced and sold," the court noted that "[i]f a better rule is required, the FEA is well equipped to make the necessary changes through its rule-making powers," *Id.* at 305. The court called the FEA's interpretation of the rule "plainly inconsistent" with its language and affirmed the district court's denial of enforcement. *Id.*[17]

In the situation before us, we do not find any support for the Commission's decision that the rule's language, "in the store or department," can be read to mean "in each department." The Commission reasoned that unless signs, notifying the consumer of the availability of the warranty binders, are close to the warranted product, a consumer would be likely to forget that the warranties on different products are available for comparison. Although that reasoning may be entirely rational, the result is inconsistent with the rule. "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976). *See Marshall v. Anaconda Co.*, 596 F.2d 370, 376 (9th Cir. 1979) (application of *Diamond* language to an ambiguous regulation).

In addition, we also note that there was some confusion between the ALJ and the Commission on the propriety of signs affixed to cash registers in the appropriate departments.[18] The ALJ's order required Wards to utilize cash register signs, while the Commission rejected their use and intimated that they would not be recognized as "in the department" in future compliance surveys.

Part of the reason the Commission and the ALJ are unable to agree on this issue is that their argument is far afield from the plain meaning of the rule. "We reiterate that [a regulated party] should not be held to standards, the application of which cannot be agreed upon by those charged with their enforcement." *Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940, 944 (9th Cir. 1979).

In short, the Commission's decision on the sign requirements of the presale rule's binder option was an abuse of discretion. If the FTC wishes to amend the rule to require signs in each department, it may do so in a formal rule-making proceeding. Until such time as the rule is amended, however, the FTC may not hold retail sellers to any standard other than that stated in the rule.

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[17] *Cf. Sauder v. Dept. of Energy*, 648 F.2d 1341 (Em.App. 1981), in which the court distinguished *Tenneco* and decided that the standard announced in an adjudication was a well-founded amalgamation of the various applicable rules.

[18] *See* the discussion, *supra*, at part II B.

E. *Cease and Desist Order.*

[10] Having held that the Commission's order concerning sign placement is invalid and is thus unenforceable, we now consider the operation of the remaining portion of the order; concerning the placement of the warranty binders. We have no difficulty with the order in the respect that it announces an interpretation of the rule that is to apply in the future. Our concern is with the retroactive effect of the cease and desist order.

The Commission is allowed wide latitude in determining what type of order is neces[1333]sary to bring an end to the illegal practices found to exist. *FTC v. National Lead Co.,* 352 U.S. 419, 428-29, 77 S.Ct. 502, 508-09, 1 L.Ed.2d 438 (1957) (unfair competition); *Litton Industries, Inc. v. FTC,* 676 F.2d 364, 370 (9th Cir. 1982) (false advertising). The remedy selected by the Commission, however, must have a "reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 394-95, 85 S.Ct. 1035, 1048, 13 L.Ed.2d 904 (1965). "Among the circumstances which should be considered in evaluating the relation between the order and the unlawful practice [is] whether the respondents acted in blatant and utter disregard of the law. . . ." *Standard Oil Co. of California v. FTC,* 577 F.2d 653, 662 (9th Cir. 1978).

In the case at hand, the Commission's order, in substance, requires Wards to comply with the one-binder-per-floor definition of ready access. Wards argues that the cease and desist order was an abuse of discretion. The basis of Wards's position is that its good faith efforts to comply with the rule demonstrate that no "cognizable danger of recurrent violation[s]" exists. *See United States v. W.T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 898, 97 L.Ed. 1303 (1953). Without some greater possibility of future violations, Wards argues a cease and desist order is improper.

The FTC contests Wards's statements of good faith. It points out that approximately ten percent of Wards's stores were found to be in violation of the rule and that Wards's internal audit program is not yet consistent with the Commission's statement of the rule. As the Commission's order is not yet final and enforceable, *see* 15 U.S.C. § 45(g), we are not persuaded by evidence of Wards's failure to comply with it.

The FTC also argues that this case involves a cease and desist order that applies prospectively only. While we agree that a cease and desist order leads only to future sanctions, we also note that those sanctions would not be possible except for Wards's conduct prior to the Commission's explanation of ready access in its order. If the FTC had utilized its rule-making proceedings to define ready access, this retroactivity problem would not exist.[19] We must therefore examine the retroactive effect of the order relating to the placement of the binders.

In balancing a regulated party's interest in being able to rely on the terms of a rule as it is written, against an agency's interest in retroactive application of an adjudicatory decision, a good framework for analysis is set forth in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390-93 (D.C.Cir. 1972).[20]

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390.

In considering the first three criteria, we observe that the requirement of one binder per floor was not an abrupt departure from established practice. Although this is a case of first impression, Wards's involve**[1334]**ment in the rule-making process would indicate that such a requirement would not be a complete surprise, or have misled Wards from a requirement upon which it had relied. Thus, these first three factors do not weigh heavily in Wards's favor.

The fourth factor relates to the burden imposed on Wards by enforcement of the order. Because the FTC takes the position that a cease and desist order acts prospectively only, it argues that the burden on Wards, if any, is miniscule. We are directed to our decision in *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952), which involved approval of an order to cease and desist from recognizing a union. The nature of the order in *Guy F. Atkinson* is factually distinct, however, from that in the case at hand. There, the order dealt with a discrete restriction on contact between the employer and the union. Such an order presents a very small burden, as there is only a low potential for violation through poor oversight or inadvertence. To violate the order would almost necessarily require intentional disobedience.[21]

Wards, on the other hand, is faced with an order containing innumerable variables, collectively presenting considerable opportunity for human frailty to allow non-complying conduct. Wards must control the placement and upkeep of many hundreds of binders in stores spanning the country. Any instance of non-compliance will subject Wards to a civil penalty of up to ten thousand dollars for each violation. 15 U.S.C. § 45(*l*). In contrast, noncompliance by Wards's competitors, who have now been clearly notified that large retail stores must have at least one set of binders per floor, will not result in fines, but rather in a cease and desist order. Thus, Wards is placed at a serious disadvantage compared to its competitors because of its conduct prior to the Commission's articulation of the one-per-floor standard.

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[19] In *Litton* we noted that a cease and desist order is enforceable in the district court. 676 F.2d at 371. In an enforcement action, the court may assess up to $10,000 in fines for each violation. 15 U.S.C. § 45(*l*) (made applicable by 15 U.S.C. § 2310(b), which makes a violation of the Act a violation of 15 U.S.C. § 45(a)(1)).

[20] The *Retail Union* test has been used in *McDonald v. Watt*, 653 F.2d 1035, 1043-46 (5th Cir. 1981); *E.L. Wiegand Division v. NLRB*, 650 F.2d 463, 471 & n. 5 (3d Cir. 1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1429, 71 L.Ed.2d 649 (1982); *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1063-64 (Temp.Emer.Ct.App. 1978); *Lodges 743 and 1746 v. United Aircraft Corp.*, 534 F.2d 422, 452-54 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976).

[21] Despite the approval of the cease and desist order in *Guy F. Atkinson*, it was not enforced. The NLRB, in the meantime, certified the union as the bargaining representative, thus that portion of the order was moot. *Guy F. Atkinson*, 195 F.2d at 151.

The final question in our analysis is the regulatory interest in applying the new statement of the rule retroactively. The FTC argues that its inherent authority to interpret its rules would be vitiated if we were to decide not to enforce its order here. As is apparent from our earlier discussion, it was a close question whether the Commission's restatement of the ready access requirement constituted a proper interpretive decision, or was rather an inappropriate short cut to an amendment of the rule. There is no indication that, given a clear legal duty, Wards would not fully comply. It would seem, then, that the enforcement of the order would be of minor significance to the realization of the goals of the Act and of the pre-sale rule, and would place an unfair burden on Wards. We therefore conclude that the Commission's order may not be applied retroactively.

IV

CONCLUSION

The Commission interprets its rule as requiring Wards to provide customers with ready access to warranty binders by placing at least one set of binders on each sales floor. We hold that the Commission's decision to issue that portion of the order was within its discretion, insofar as it applies prospectively in setting forth the standard with which Wards and other similar retailers must comply. However, the cease and desist order, which would invoke penalties under 15 U.S.C. § 45(*l*), is vacated.

We also hold that the Commission's order that requires the signs concerning availability of the binders to be placed in each department is contrary to the express language of the rule, and is, therefore, an abuse of discretion. This portion of the order is also vacated.

AMERICAN HOME PRODUCTS CORPORATION
v.
FEDERAL TRADE COMMISSION*

No. 81-2920 FTC Docket No. 8918

The United States Court of Appeals, Third Circuit
December 3, 1982, as Amended January 4, 1983

1. **Court is only permitted to review FTC's findings of deceptiveness in advertising under the substantial evidence in the record as a whole standard, to determine if evidence in the record is such as a "reasonable mind might accept as adequate" to support those findings.**

Federal Trade Commission's findings of deceptiveness in advertising nonprescription drugs were reviewable under substantial evidence in the record as a whole standard, which did not permit reviewing court to weigh the evidence but only to determine that there was in the record such relevant evidence as reasonable mind might accept as adequate to support a conclusion.

2. **The desideratum of advertising is the impression it creates, rather than its literal truth or falsity, and thus the advertising must be viewed as a whole in order to judge its tendency to deceive.**

Tendency of advertising to deceive must be judged by viewing it as a whole, not emphasizing isolated words or phrases apart from their context; impression created by the advertising, not its literal truth or falsity, is the desideratum.

3. **FTC has right to look beyond spoken words to message conveyed visually to determine whether television advertisement is deceptive.**

Federal Trade Commission, in determining whether television advertisement is deceptive, has right to look beyond its spoken words to the message conveyed visually.

4. **FTC's determination that manufacturer had misrepresented that superiority of its nonprescription analgesics had been established was supported by substantial evidence.**

Substantial evidence supported determination of Federal Trade Commission that manufacturer represented that the superiority of its nonprescription analgesics had been proven or established and that such representation was deceptive.

5. **Where plaintiff was not deprived of opportunity to present evidence on the matter, and challenged provision of FTC order was based on Commission holding that it was misleading not to reveal in advertising containing superiority claims for analgesics that a substantial question exists as to whether such superiority has been established, manufacturer was not denied administrative due process.**

Manufacturer of nonprescription analgesics was not denied administrative due process with regard to portion of Federal Trade Commission order forcing manufacturer either to reveal existence of a substantial question about the superiority of its products or cease advertising such superiority where that portion of Commission's order was based on Commission's allegations that there was a "substantial question" whether claimed superiority of manufacturer's products had been proven or established and that failure to set forth that substan[682]tial question in advertisement's claiming superiority was misleading and where manufacturer was not denied an opportunity to introduce evidence either as to when a substantial question exists in medical-science community or as to whether, in a present case, failure on part of manufacturer to reveal a substantial question was misleading.

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*Reported in 695 F.2d 681 (1982). For case before the Commission, see 98 F.T.C. 136.

6. **Manufacturer's past conduct and FTC's determination that unverified claims relating to superior effectiveness or freedom from side effects of nonprescription analgesics were deceptive, supported provision requiring manufacturer to either provide specified verification, or disclose existence of substantial question as to the truth of such claims.**

Fact that nonprescription analgesics drug manufacturer's claims of the superior effectiveness or freedom from side effects were deceptive in absence of a designated type of proof, when considered with fact of manufacturer's past actions, supported provision of Federal Trade Commission order directing manufacturer, when making unequivocal claims of superior effectiveness or freedom from side effects for nonprescription analgesics, to verify such claims with two well-controlled clinical studies, or to reveal that there existed a substantial question about their truths.

7. **When no appropriate level of support for a drug product exists, failure to disclose that fact is misleading.**

Failure to disclose that a claim regarding a drug product lacks an appropriate level of support, when such support is non-existent, is misleading.

8. **FTC bears primary responsibility for fashioning orders to remedy unfair or deceptive acts that violate the FTCA.**

With regard to unfair or deceptive acts in violation of Federal Trade Commission Act, primary responsibility for fashioning orders rests with Federal Trade Commission.

9. **While an FTC order that attempts to fence in a violation of the FTCA need be no more definite than circumstances permit, it must bear a reasonable relation to violation found and be sufficiently clear and precise to be understood by the violator.**

Federal Trade Commission when attempting to fence in a violator of Federal Trade Commission Act prohibitions against unfair or deceptive acts, must adhere to two rules: there must be a reasonable relation between the violation and the order and the order must be sufficiently clear and precise to be understood by the violator although the order need be no more definite than circumstances permit.

10. **Requiring manufacturer to cease claiming falsely that its nonprescription analgesics contain special ingredients or more of an active ingredient than did competing products and to stop misrepresenting surveys or tests was not an abuse of FTC's discretion.**

Federal Trade Commission did not abuse its discretion in requiring manufacturer of nonprescription analgesics to cease claiming falsely that its products had special ingredients or had more of an active ingredient than did competing products or in requiring that manufacturer stop misrepresenting surveys or tests.

11. **Where provision of order which required a reasonable basis for claims regarding effectiveness or freedom from side effects of respondent's over-the-counter drugs included**

products as to which deceptions had not been found and deceptive practices dissimilar to those found, it would be vacated in its entirety as being excessively vague and overbroad.

Portion of Federal Trade Commission order requiring manufacturer of nonprescription analgesics to abandon all noncomparative claims of effectiveness or freedom from side effects of its over-the-counter drug products lacking a reasonable basis, which covered many products as to which no deceptions were found and which encompassed deceptive practices which seem to be quite dissimilar to the deceptions actually found, was excessively vague and overbroad and would be vacated in its entirety.

12. **FTC did not act improperly in requiring that the presence of aspirin be disclosed in advertisements containing performance claims after finding that certain advertisements for manufacturer's nonprescription analgesics were deceptive.**

Federal Trade Commission, which found that certain advertisements for manufacturer's nonprescription analgesics were deceptive, did not act improperly in requiring that manufacturer disclose the presence of aspirin when any performance claim was made in its advertisements.

Petition was filed seeking review of an order of the Federal Trade Commission which required that manufacturer cease and desist various deceptive advertisements for a number of its drug products. The Court of Appeals, Adams, Circuit Judge, held that: (1) substantial evidence supported determination of Commission that manufacturer represented that the superiority of its nonprescription analgesics had been proven or established and that such representation was deceptive; (2) manufacturer was not denied administrative due process with regard to portion of Commission order forcing manufacturer either to reveal existence of a substantial question about the superiority of its products or cease advertising such superiority; (3) Commission did not abuse its discretion in requiring manufacturer of nonprescription analgesics to cease claiming falsely that its products had special ingredients or had more of an active ingredient than did competing products or in requiring that manufacturer stop misrepresenting surveys or tests; and (4) portion of order requiring manufacturer to abandon all noncomparative claims of effectiveness or freedom from side effects of its over-the-counter drug products lacking a reasonable basis was excessively vague and overbroad and would be vacated in its entirety.

Order enforced as modified.

(*Syllabus, with substituted captions, taken from 695 F.2d 681*)

Samuel W. Murphy, Jr. (argued), *David S. Versfeld, Donovan Leisure Newton & Irvine,* New York City, *John J. McGrath, Jr., John P. Dean, Donovan Leisure Newton & Irvine,* Washington, D.C., for petitioner, *Charles F. Hagan,* American Home Products Corp., New York City, of counsel.

John H. Carley, Gen. Counsel, *Howard E. Shapiro,* Deputy Gen. Counsel, *Ernest J. Isenstadt,* Washington, D.C. (argued), Acting Asst. Gen. Counsel, for respondent.

Before Adams, Hunter, and Becker, *Circuit Judges.* **[683]**

OPINION OF THE COURT

Adams, *Circuit Judge.*

Before us is a petition for review of an Order entered by the Federal Trade Commission ("Commission") against American Home Products ("AHP"). The Order requires that AHP cease and desist various deceptive advertisements for a number of its drug products, including Anacin and Arthritis Pain Formula (APF). AHP does not take issue with all of the findings of deceptiveness on which the Order is based. It argues nonetheless that some of these findings are not supported by substantial evidence, and that, whether or not the findings are adequately supported, certain aspects of the Order remain unjustified. We uphold the Commission's findings, and accordingly will affirm the core of its Order. We agree, however, with some of AHP's objections to the Order's vagueness and breadth, and therefore will direct that the Order be modified accordingly.

I. Background

The petition for review represents the most recent stage of a proceeding that was initiated by an administrative complaint filed almost ten years ago. Issued on February 23, 1973, the complaint alleged that AHP, in its advertisements for Anacin and APF, had engaged in unfair or deceptive acts in violation 15 U.S.C. §§ 45 and 52 (sections 5 and 12 of the Federal Trade Commission Act).[1] That same day, the Commission filed similar complaints against Bristol-Myers Company, manufacturer of Bufferin and Excedrin, and Sterling Drug Inc., manufacturer of Bayer Aspirin. These other cases are currently pending on appeal in the Commission, and are not before the Court at this time.

Anacin is a non-prescription analgesic that is composed of two active ingredients, aspirin (400 milligrams) and caffeine (32.5 milligrams). There is no contention here that caffeine, either in itself or in conjunction with aspirin, is an analgesic. Thus, Anacin's sole pain-killing component is aspirin. *See* App. 303. An "ordinary" aspirin tablet contains 325 milligrams of aspirin. The recommended dosage of Anacin is one or two tablets. APF, also a non-prescription analgesic, contains "micronized" aspirin (486 illigrams)—that is, it is an aspirin tablet formulated with small aspirin articles—along with two antacids.

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[1] The complaint also named Clyne Maxon, Inc., the advertising agency for APF. Although Parts V and VI of the Commission's Order in this proceeding imposed requirements on Clyne Maxon, Clyne Maxon has ceased doing business and has not petitioned for review. We will therefore consider the Order only insofar as it applies to AHP.

The complaint charged, among other things, that AHP's advertisements ad falsely claimed that Anacin has a unique pain-killing formula that has een conclusively proven to be superior in effectiveness to all other nonrescription analgesics, and that Anacin is a tension reliever. Another of ie complaint's accusations was that the petitioner misrepresented that APF superior to competing products in that it causes less frequent side effects. .HP's answer, filed May 29, 1973, denied any violation of the Federal Trade 'ommission Act. The petitioner's position was that it did not make the dvertising claims which the complaint accused it of making, and that any laims it did make were truthful.

15 U.S.C. § 45(a)(1) declares unlawful "[u]nfair methods of competion in or affecting commerce, and unfair or deceptive acts or practices in r affecting commerce. . . ." Under 15 U.S.C. § 52(a), it is unlawful to isseminate "any false advertisement . . . [b]y any means, for the purpose f inducing, or which is likely to induce, directly or indirectly, the purchase ı or having an effect upon commerce of food, drugs, devices, or osmetics." 15 U.S.C. § 52(b) makes such dissemination of false adversements an "unfair or deceptive act or practice" under section 45, thereby iggering the various enforcement and review provisions of section 45. False advertisement," as defined by 15 U.S.C. § 55(a)(1), is a broadly ıclusive term. It encompasses not merely advertisements that are literally ntrue, but also materially misleading ad**[684]**vertisements—even where it only the failure to reveal material facts that renders the advertisement iisleading.[2]

Extensive hearings were conducted in connection with the complaint gainst AHP. On September 1, 1978, the Administrative Law Judge 'ALJ") issued an Initial Decision and Order (App. 85-344), meticulously eviewing the record evidenced and resolving most issues in favor of the omplaint counsel. On cross-appeals the Commission, in an Order and Opiion issued September 9, 1981, upheld the ALJ in almost all respects (App. 45-426). The ALJ's findings of fact and conclusion of law were adopted xcept to the extent inconsistent with the Commission's opinion. App. 346. Vhereas the ALJ found AHP's practices "unfair and deceptive," the Comiission chose to speak only in terms of deception. Both the ALJ and the 'ommission focused on the capacity of AHP's advertisements to mislead, nd, as the Commission remarked in denying rehearing, the difference in pproach was "more of form than of substance." App. 430.

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[2] 15 U.S.C. § 55(a)(1) reads in pertinent part: The term "false advertisement" means an advertisement, other than label-g, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be ken into account (among other things) not only representations made or suggested by statement, word, design, device, und, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light such representations or material with respect to consequences which may result from the use of the commodity to which e advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary usual.

The Commission's Order has several sections.[3] Although the Commission's findings related solely to Anacin and APF, some portions of the Order were directed to other products as well. Part I of the order applied to Anacin, APF, and "any other non-prescription internal analgesic product" of AHP's. In I(A)—the "establishment" provision—the Commission demanded that when AHP represents that the superior freedom from side effects or superior effectiveness of one of these products to any other products has been "established or proven," AHP must be able to support this representation with at least two well-controlled clinical investigations. I(B) of the Order—the "substantial question" provision—takes I(A) a step further, and, in effect, imposes the I(A) support requirements on AHP whenever its advertisements claim superior effectiveness or freedom from side effects, even when those advertisements do not overtly claim that this superiority has been established or proven.[4] If AHP cannot provide two or more well-controlled clinical studies to support its superiority claims, it is prohibited from making such claims in an unequivocal manner. It is allowed, however, to assert superiority, provided it discloses that the superiority is open to substantial question.

Part II of the Order applies to all of AHP's non-prescription drug products, not merely the non-prescription internal analgesics. II(A) prohibits AHP from representing that a product contains an unusual or special ingredient when the actual ingredient is commonly used in other non-prescription drugs intended for the same uses. Under II(B), AHP must cease "[m]aking false representations that [any non-prescription drug] product has more of an active ingredient than any class of competing products." The misrepresentation of test or survey data concerning effectiveness or freedom from side effects is proscribed by II(C). II(D), an especially far-reaching provision in the Order, requires that AHP cease even noncomparative claims of effectiveness or freedom from side effects unless it possesses a reasonable basis for these claims. **[685]**

Under Part III of the Order, AHP is required, whenever an advertisement makes a performance claim for Anacin or APF, to disclose in a clear and conspicuous manner that the analgesic ingredient in the product is aspirin.

Part IV of the Order—the "tension relief" provision—covers only Anacin. It directs AHP to cease any representations that Anacin "relieves nervousness, tension, anxiety or depression. . . ."

The Order is prospective only. It is designed to ensure that future advertisements will neither mislead the public further nor confirm entrenched misimpressions induced by previous advertisements. Although the Commission found, and AHP in large part no longer disputes, that AHP has engaged in large-scale deception, the Order reflects no punitive intent. The Order does insist that AHP's advertisements make disclosures under many circumstances, but requires disclosures only where AHP makes certain types of claims. Thus the affirmative obligation to provide information to the public is not unconditional under the Order, but will be triggered only when AHP advances certain claims for its products.

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[3] The Order is discussed at length *infra;* only an overview is attempted at this point. The Appendix to the present opinion reproduces the relevant portions of the Order.

[4] Part I(B) was the only provision that was not unamimous. *See* Commissioner Clanton's separate statement, App. 353-58.

A motion for reconsideration filed by AHP was denied on January 21, 1982 (App. 429-34). In separate statements, two commissioners maintained that the Commission as an exercise of discretion should stay the Order, or vote to reconsider it, because of the possibility that the decision might require modification to guarantee that the treatment of AHP be consistent with that of AHP's competitors, Bristol-Myers and Sterling Drug, which had Commission proceedings pending against them.

AHP then petitioned this Court for review pursuant to 15 U.S.C. § 45(c). It asks that Parts I, II(D) and III be vacated, and that II(A), II(B) and II(C) be limited to Anacin and APF. No relief from the strictures of Part IV is requested. We shall first take up AHP's challenge to the findings of deceptiveness that underlie Part I of the Order, and AHP's administrative due process challenge to Part I(B). We shall then turn to a consideration of whether Part II of the Order must be modified as excessively broad or vague, despite AHP's apparent acceptance of the factual findings on which Part II is predicated. The final portion of the opinion will focus on AHP's First Amendment challenge to Part III of the Order.[5]

II. Part I of the Order

Part I of the Order consists of two provisions. Part I(A) demands that AHP cease falsely to represent that its non-prescription analgesics are medically proven or established to be superior in effectiveness or freedom from side effects to those of competitors. AHP charges that the Commission lacked substantial evidence either that representations of proven superiority were made, or, if they were made, that they were misleading. Under Part I(B), AHP may not represent the superiority of its non-prescription analgesic unless it has established that there exists a specified level of medical evidence. AHP addresses both procedural and substantive challenges to Part I(B). It argues that it was denied administrative due process by reason of changes in the Commission's theory of liability during the **[686]** course of the proceedings. AHP's substantive objections to Part I(B) are analogous to those made against Part I(A): that the proscribed claims were never made and would not be misleading even if they were. It should be stressed that all the advertising claims at issue—both those that the Commission found to have been made and those that AHP acknowledges were present—are susceptible of objective measurement and intended to be taken seriously. AHP does not defend its advertisements as lawful "puffing."[6]

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[5] Throughout the intricacies of this case, it is well to bear in mind what the Commission characterized as "the heart of the case before us," App. 359:

> Aspirin: homey, familiar, time-tested aspirin has long been an honored staple in the American family's arsenal against common maladies. So homey is this ingredient that it evokes no aura of mystery or magic, though indeed its therapeutic properties are significant; so familiar that the firm that pioneered its development was stripped of its trademark in private litigation 60 years ago;[1] so commonplace that a maker of one aspirin-based pain reliever seeking to differentiate its product from the rest faces a formidable marketing task. What better way to meet this challenge than to establish a new identity for the product, dissociated from ordinary aspirin, and then to represent it is special and more effective than its competitors? That effort may solve the marketer's marketing problem—but if the representations of specialness and superiority are not adequately supported, they can be, simply put, deceptive.

[1] *Bayer Co. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

A. The Standard of Review of Findings of Deceptiveness

[1] 15 U.S.C. § 45(c) directs that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." It is "clear that properly interpreted, the statute requires review by the substantial evidence in the record as a whole standard," *Beneficial Corp. v. FTC,* 542 F.2d 611, 616 (3d Cir. 1976) (footnote, citing cases omitted), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). This standard "does not permit the reviewing court to weigh the evidence, but only to determine that there is in the record '"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"' " *Steadman v. SEC,* 450 U.S. 91, 99, 101 S.Ct. 999, 1006, 67 L.Ed.2d 69 (1981) (quoting previous decisions).

This deferential standard with respect to Commission findings of fact applies to the findings here. Although "in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction," *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965), a Commission finding that advertisements are deceptive or tend to mislead "is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law," *Beneficial, supra,* 542 F.2d at 617 (applying "substantial evidence" standard to Commission findings that advertisement was deceptive). *Colgate-Palmolive* explained that the "statutory scheme" created by section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in particular the generality and flexibility of the statutory standards of illegality,

> necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment.

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[6] Although Part I covers products other than Anacin and APF, AHP has not chosen to challenge the Order as overly broad in this respect. Accordingly, we assume that if Part I should be enforced as to Anacin and APF there is no occasion to consider limiting its scope.

380 U.S. at 385, 85 S.Ct. at 1042 (footnote omitted).[7]

The Commission's familiarity with the expectations and beliefs of the public, acquired by long experience, is especially crucial when, as with the advertisements proscribed by Parts I(B) and III of the Order in this case, "the alleged deception results from an omission of information instead of a statement." *See Simeon Management Corp. v. FTC,* 579 F.2d 1137, 1145 (9th Cir. 1978).[8] **[687]**

B. How Advertising Is To be Interpreted

[2] "[T]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context," *Beneficial, supra,* 542 F.2d at 617. The impression created by the advertising, not its literal truth or falsity, is the desideratum:

> Do these advertisements create a false impression as to the value of "Lite Diet" bread as compared with other articles of food? The Commission's judgment is what controls here unless a court finds that the judgment is unsupported by evidence or is capricious or arbitrary or what you will. We think an examination of the advertisements clearly supports the Commission's finding that by implication and innuendo the deceptive impression had been created.

Bakers Franchise Corp. v. FTC, 302 F.2d 258, 261 (3d Cir. 1962).[9]

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[7] *Cf.* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 HARV.L.REV. 661, 677-79 (1977) (explaining the "virtually unreviewable" discretion of the Commission in interpreting advertisements by reference (1977) (explaining the "virtually unreviewable" discretion of the Commission in interpreting advertisements by reference to "the administrative inconvenience of alternative approaches," rather than by reference to the Commission's expertise.)

[8] The cases relied upon by AHP do not question the rule that our standard of review must be deferential. *Cinderella Career and Finishing Schools, Inc. v. FTC,* 138 U.S.App.D.C. 152, 425 F.2d 583, 585-88 (1970) concerned the power of the Commission, sitting as a reviewing body, to reverse factual findings of a hearing examiner without explaining the reasons for doing so. *Cinderella Career* has no bearing on a case such as the present one, in which the Commissioners not only endorse the findings of the ALJ challenged by the petitioner but thoroughly explain their view of the evidence.

Two appellate decisions dealing with advertisements for hemorrhoid preparations disagree with the Commission's determinations that certain representations were misleading. *American Home Products Corp. v. FTC,* 402 F.2d 232 (6th Cir. 1968); *Grove Laboratories v. FTC,* 418 F.2d 489 (5th Cir. 1969). But neither court found that the Commission was mistaken in its interpretation of what the advertisements were representing and both courts ordered that most of the provisions of the orders under review be enforced. Significantly, both courts appear to have given the Commission's findings substantial weight.

FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963) and *FTC v. Simeon Management Corp.*, 532 F.2d 708 (9th Cir. 1976), affirmed district court refusals to grant the Commission injunctive relief under 15 U.S.C. § 53(a). The Commission had sought such relief pending final resolution of the administrative proceedings. Far different considerations come into play when, as in the present case, a court of appeals is asked to review a final cease and desist order of the Commission after the full panoply of administrative proceedings have been conducted. *See Sterling Drug,* 317 F.2d at 678 (Marshall, J., concurring); *Simeon Management,* 532 F.2d at 717. *See also Simeon Management Corp. v. FTC,* 579 F.2d 1137 (9th Cir. 1978) (affirming, after final Commission determination, that advertisements at issue in the previous *Simeon Management* case were in violation of the statute.)

[9] *See National Commission on Egg Nutrition v. FTC,* 570 F.2d 157, 161 n. 4 (7th Cir. 1977), *cert. denied,* 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978) ("an otherwise false advertisement is not rendered acceptable merely because one possi- ble interpretation of it is not untrue," quoting Commission); *Resort Car Rental System, Inc. v. FTC,* 518 F.2d 962, 964 (9th Cir. 1975) ("Advertising capable of being interpreted in a misleading way should be construed against the advertiser"); *J.B. Williams Co. v. FTC,* 381 F.2d 884, 890 (6th Cir. 1967) (commission "not bound to the literal meaning of the words"); *Carter Products, Inc. v. FTC,* 323 F.2d 523, 528 (5th Cir. 1963) ("the Commission need not confine itself to the literal meaning of the words used but may look to the overall impact of the entire commercial"); and *Murray Space Shoe Corp. v. FTC,* 304 F.2d 270, 272 (2d Cir. 1962) ("In deciding whether petitioners' advertising was false and misleading we are not to look to technical interpretation of each phrase, but must look to the overall impression these circulars are likely to make on the buying public . . . And statements susceptible of both a misleading and a truthful interpretation will be con- strued against the advertisers," citations omitted). *See also Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188, 68 S.Ct. 591, 596, 92 L.Ed. 628 (1948). *Cf.* C. Lasch, The Culture of Narcissism 140-41 (1979) (criticizing mass culture, and product advertising in particular, not for obvious untruths but for blurring of truth and falsehood).

It is true that on some crucial points in the case at hand the Commission lacked direct evidence that consumers were in fact misled. But the Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception.[10] **[688]**

[3] In the present proceeding, the Commission analyzed not only the words used, but also, with respect to the television advertisements, the messages conveyed through the "aural-visual" pattern. App. 254 and 374-75. The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words. In *Standard Oil Co. of California v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978), the court upheld a Commission finding "that the predominant visual message was misleading, and that it was not corrected or contradicted by the accompanying verbal message in advertisements." *Colgate-Palmolive, supra,* 380 U.S. at 385-86, 85 S.Ct. at 1042-43 also supports the Commission's right to look beyond spoken words to the message conveyed visually. According to *Colgate-Palmolive,* "even if an advertiser has himself conducted a test, experiment or demonstration which he honestly believes will prove a certain product claim, he may not convey to television viewers the false impression that they are seeing the test, experiment or demonstration for themselves, when they are not because of the undisclosed use of mock-ups."[11]

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[10] *Simeon Management Corp. v. FTC, supra,* 579 F.2d at 1146 n. 11, for example, states:
Advertisements having the capacity to deceive are deceptive within the meaning of the FTCA; actual deception need
not be shown, *Goodman v. Federal Trade Commission,* 244 F.2d 584, 602 (9th Cir. 1957). It is well settled that "[t]he
Federal Trade Commission has the expertise to determine whether advertisements have the capacity to deceive or mislead
the public. Consumer testimony, although sometimes helpful, is not essential."
(quoting *Resort Car Rental Systems, supra.*) In *Colgate-Palmolive, supra,* 380 U.S. at 391-92, 85 S.Ct. at 1046, it was not
considered "necessary for the Commission to conduct a survey of the viewing public before it could determine that the
commercials had a tendency to mislead . . . ." According to *Beneficial, supra,* 542 F.2d at 617.
the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers;
the likelihood or propensity of deception is the criterion by which advertising is measured.
Other cases authorizing the Commission to rely on its own interpretations, without resort to consumer testimony or surveys,
include *Carter Products, supra,* 323 F.2d at 528; *J.B. Williams, supra,* 381 F.2d at 890; and *E.F. Drew & Co. v. FTC,*
235 F.2d 735, 741 (2d Cir. 1956), *cert. denied,* 352 U.S. 969, 77 S.Ct. 360, 1 L.Ed.2d 323 (1957).
AHP appears to hint that under *In re R.M.J.,* 455 U.S. 191, —, 102 S.Ct. 929, 938, 71 L.Ed.2d 64 (U.S. 1982) there
is a First Amendment violation when a finding that an advertisement is misleading and an order predicated on this finding
is not based on empirical evidence that the public was in fact misled. *See* Petitioner's Br. 38 n. 57. This would be a distortion
of *R.M.J. See e.g. Young v. American Mini Theatres Inc.,* 427 U.S. 50-68, 96 S.Ct. 2440-2451, 49 L.Ed.2d 310 (1976):
"[R]egulatory commissions may prohibit businessmen from making statements which though literally true, are *potentially*
deceptive." (emphasis added).

[11] There is no contention in this case that even if the advertisements are misleading they are not "misleading in a material respect" under 15 U.S.C. § 55(a)(1). Once the Commission finds deception, it is normally allowed to infer materiality. *See e.g., Colgate-Palmolive, supra,* 380 U.S. at 391-92, 85 S.Ct. at 1046.

C. Part I(A) of the Order

[4] We have no hesitation in affirming the Commission's determination that AHP represented that the superiority of Anacin had been proven or established,[12] and that such representation was deceptive.

1. Were the establishment claims made?

The ALJ's overall method for interpreting advertisements is unexceptionable. He wrote:

> I have primarily relied on my knowledge and experience to determine what impression or impressions an advertisement as a whole is likely to convey to a consumer. When my initial determination is confirmed by the expert testimony of complaint counsel or respondents, I rested. When my initial determination disagreed with that of expert testimony, **[689]** which was often conflicting, I reexamined the advertisement in question, and further considered such record evidence as the ASI copy tests and verbatim responses [a type of survey evidence] before reaching a final determination. In this connection, my determinations agreed in most instances with those of Dr. Ross, complaint counsel's expert, and disagreed with those of Dr. Smith in most instances.

App. 255, footnotes omitted. The Commission expressed its approval of this methodology at some length. App. 421-26. Both the ALJ and the Commission amply defended their reasons for awarding limited weight to the testimony of AHP's expert. App. 255-56; 423-24. The opinion of the ALJ explored in minute detail the survey evidence offered by AHP. App. 210-43. In contrast, the interpretations that AHP presses upon us rely primarily on technical readings of the advertisements in question. If accepted, AHP's position might well preclude the Commission from taking action against advertisements that, when read with scrupulous care by vigilant and literal-minded consumers, could be seen to be making true claims.[13]

One advertisement which appeared in virtually identical form in several magazines is entitled "News about headache relief you probably missed (unless you read medical magazines)." Beneath what was designed to resemble a clipping from a medical journal, the body of the advertisement informed readers:

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[12] The Commission did not find that AHP had made any establishment claim for APF (App. 373 n. *) although, as discussed *infra*, it determined that APF advertisements misleadingly claimed that this product causes less gastric discomfort than do competing products. Although Part I(A) is directed in part to representations that the superior freedom from side effects of a product has been proven, and AHP was not found to have made such representations, AHP makes no challenge to the provision is excessively broad.
Part I(A) on the grounds that by encompassing claims about side effects the provision is excessively broad. analysis of the

[13] One way to phrase the controversy is that AHP would have the Commission perform a "semantic" analysis of the advertisements, whereas the Commission, consistently with settled law, is more interested in a "pragmatic" analysis. While semantics deals with meaning in the strict sense, the theory of pragmatics aims to explain "how it is that speakers of any language can use the sentences of that language to convey messages which do not bear any necessary relation to the linguistic content of the sentence used." *See* R. Kempson, Semantic Theory 68 (1977). *See* R. Stalnaker, *Pragmatics*, in Semantics of Natural Language 380 (G. Harman and D. Davidson eds. 1972). *Cf.* H.P. Grice, *Logic and Conversation*, in The Logic of Grammar 64 (D. Davidson and G. Harman eds. 1975) (developing the distinction between what is "said" and what is "implicated.")

> In clinical tests on hundreds of headache sufferers, it has now been proven beyond a doubt that today's Anacin delivers the same complete headache relief as the leading pain relief prescription. This advertisement in leading medical journals [i.e., the clipping] told the complete story. Doctors know Anacin contains more of the specific medication they recommend most for pain than the leading aspirin, buffered aspirin, or extra-strength tablet. Is it any wonder that last year physicians and dentists distributed over 25 million packets of Anacin tablets to their patients?
>
> Now you know that Anacin gives you the same compete headache relief as the leading pain relief prescription. Next headache, see how fast Anacin relieves your pain.

App. 547. *See* App. 548-49. The advertisement, read with sedulous attention, proclaims that Anacin has been clinically proven to be as effective as the leading prescription analgesic, and that Anacin is known by doctors to have more of the pain reliever they recommend most than do the other leading non-prescription analgesics. There is no explicit representation that Anacin has been clinically proven to be more effective than any other non-prescription analgesics. The ALJ found that the clinical tests in question did not prove Anacin's equivalence to the leading prescription analgesic (App. 184-87), and the Commission appears to have agreed (App. 386). But for the purpose of Part I(A) of the Order, the fundamental objection to the advertisement is that consumers, not unreasonably assuming that prescription drugs are more effective than non-prescription products, will be likely to combine the claim of *proven* equivalence to the leading prescription drug, and the claim that doctors know that Anacin has more pain reliever than the other non-prescription products, into a claim that Anacin's superiority to the other non-prescription products has been proven.

Another advertisement which appeared in several magazines reads: **[690]**

> What's best to take for tension headache pain? Why not take the fast acting pain-reliever doctors recommend most for headaches? You'll find it in Anacin Tablets. And today's Anacin gives you 100% more of this specific pain-reliever than the other leading extra-strength tablet. In minutes Anacin breaks the grip of headache pain, so relaxes its nervous tension, releases pressure on nerves and helps lift pain's depression. You feel great again after taking Anacin. You see Anacin is a special fortified combination of ingredients and *only Anacin has this formula*. Next time a tension headache strikes, see if medically-proven Anacin doesn't work better for you.

App. 550, 551, 552 (emphasis in original). A rigorous analysis reveals that this advertisement does not state that Anacin has been "medically-proven" to "work better," but, read literally, merely invites consumers to see for themselves whether "medically-proven Anacin"—the respects in which it is "medically-proven" are unspecified—works better for them. But surely it was reasonable for the Commission to conclude that consumers would be likely to take the ambiguous term "medically-proven" to relate to the principal question which the advertisement purportedly addresses: "What's best to take for tension headache pain?[14]

The Commission, despite primary reliance on its own knowledge in interpreting the advertisements, weighed all the survey evidence in the record. Although AHP produced several types of empirical data, only one type—the Audience Studies, Inc. (ASI) tests—was relevant to determining the meaning of particular advertisements, as AHP's expert admitted (App. 118).[15] ASI had conducted tests on behalf of AHP's advertising agency to measure the effectiveness of some advertisements. These tests involved none of the print or radio advertisements but rather were limited to thirty of those that appeared on television. A sample of consumers was shown films in a theater of the advertisements. Thirty or forty minutes later, the consumers wrote down what they recalled, and these responses were then tabulated and coded. AHP's expert, Dr. Smith, apparently found no consumers who thought that an "establishment" claim was made in the advertisements. The Commission, however, for a number of reasons discounted this result as being of limited usefulness. Dr. Smith's analysis was found to be flawed because his

> approach was to code a response as a "directly-related recall" only if it recited the precise language of the alleged representation. *See, e.g.*, Smith, Tr. 7541. We believe this to be an overly restrictive use of copy test results. Other expert testimony in the record shows moreover, that a low response rate of verbatims falling into a particular category is meaningless without an assessment of the advertisement tested and all surrounding circumstances, and that even after such analysis it may be impossible to determine conclusively that a given message was not communicated. (Lukeman, Tr. 241**[691]**-44, 247-48; Seltzer, Tr. 367-68). In addition, the open-ended questioning technique used by ASI does not elicit an exhaustive playback from consumers of all the representations that may be perceived in the tested advertising.

App. 425-26.

We cannot say that the Commission's appraisal of this evidence was unsupported. It is also significant that there was considerable record evidence of a widespread consumer belief in Anacin's superior efficacy, although not a belief in its *established* superiority. *See* App. 311, 416. In view of the inability of consumers to discriminate objectively between competing analgesics, discussed *infra,* the Commission was "convinced that the primary source of this consumer belief in Anacin's superiority is the advertising of the product." App. 417. The Commission apparently inferred from this that consumers implicitly hold a belief in Anacin's proven superiority; however, the Commission seems not to have relied on this inference in interpreting the advertisements. The Commission also concluded that consumers' belief in superiority, and their implicit belief in established superiority, would be likely to persist unless AHP carried out the directives of the Commission's Order. App. 418.

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[14] As discussed *infra* in connection with Part II of the order, AHP no longer disputes that claims in advertisements such as this one for Anacin's supposedly tension-relieving effect, and for its supposedly special combination of ingredients, are misleading. For reasons discussed *infra*, 698, consumers cannot, as this advertisement suggests, compare competing analgesics for themselves.

Many other advertisements could be cited. The Commission summarized some of them in App. 373-76. For example, one advertisement announced: "Medical research has definitely established that the most reliable medication in the treatment of arthritis . . . is the compound in today's Anacin tablets. . . ." In various advertisements, it was claimed that a study or test "proves," "substantiates," "shows" or proves "beyond doubt" that Anacin is on a par with the leading prescription drug. Such claims were often coupled with descriptions of clinical procedures, employed in the tests, and with misleading references to doctors' surveys. Imagery in the advertisements, including technical graphs, chemical formulas, and medical texts, reinforced the establishment claims.

[15] The other empirical evidence included studies of consumer perceptions of non-prescription analgesics, "image" studies of how consumers regard Anacin and competing brands, and "penetration" studies of consumers' ability to recall Anacin's advertising themes. No empirical evidence on the meaning of APF's advertisements was offered. *See* App. 422 n. *.

2. Were the establishment claims deceptive?

Having upheld the Commission's determination that certain of AHP's advertisements should be read as making the "establishment" claim, we proceed to consider whether the Commission could have found that claim misleading. On this issue as well it is clear that the Commission must be sustained.[16] Even though AHP's advertisements never disclosed the presence of aspirin in Anacin, the claim to superior effectiveness appears to be based on the belief that a somewhat larger dosage of aspirin, such as Anacin contains is more effective in the relief of pain that "ordinary" aspirin.

The Commission carefully considered, and rejected, the evidence that Anacin's superiority had been established or proven. It found that there was "no real dispute as to the type of evidence scientists require before they regard it as having been proven (established) that one drug is more effective than another." App. 376. *See* App. 158-63.

AHP makes much of the allegation that the word "established" lacks a fixed meaning in the medical-scientific community and that the Commission used various verbal formulations in addition to the word "established." Reply Br. 6-7; Br. 27. This relatively minor terminological dispute cannot disguise the fact that the record evidence, including the testimony of AHP's witnesses, decisively supports the Commission's finding that the scientific community agrees on the criteria for testing the comparative superiority of an analgesic. *See* App. 376-82. AHP's insinuation that the Commission is imposing an unheard of demand for "absolute" proof is unwarranted in light of the expert testimony.[17]

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[16] AHP appears to concede that certain of its claims were misleading, although it denies that such claims were establishment claims. See discussion of Part II(C) of the Order, *infra.*

[17] There also appears to be no basis for AHP's contention that the Commission is imposing a higher standard for *comparative* effectiveness claims than the Food and Drug Administration (FDA) requires before considering a drug to be *effective* at all. The Commission took great care to make certain that its requirements were consistent with and similiar in spirit to FDA regulations. App. 378-82. The Commission quoted the Supreme Court, *Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 617-19, 93 S.Ct. 2469, 2477-78, 37 L.Ed.2d 207 (1973), that the FDA's requirements—which employ virtually the same criteria of proof as those which the Commission seeks to impose here—express "well-established principles of scientific investigation," App. 382 n. *.

Quite apart from the argument that the word "established" is of uncertain meaning, AHP asserts that two studies performed for it by Dr. Gilbert McMahon meet the standard of two well-controlled clinical studies; but the Commission found numerous defects in these studies (App. 383-384).[18] The **[692]** Commission objected that the results were not statistically significant; that the drug product tested against aspirin was not shown to be equivalent to commercially-available Anacin; and that the studies failed to deal with headache pain, which AHP's witnesses conceded to be different from other types of pain. The ALJ, in a closely reasoned analysis of the McMahon studies (App. 175-83), made additional points, including that bias was introduced into the studies by the ongoing "peeking" at and evaluation of data by AHP (App. 179). We are unable to hold that the Commission acted unreasonably in refusing to assign to these studies the probative force that AHP wishes for them.

AHP also argues that the aspirin "dose response curve" proves Anacin's superior effectiveness (App. 384). Again, it is apparent that the Commission accorded the proffered evidence a thorough examination and reasonably judged it to be insufficient. A dose-response curve, as the name suggests, charts the degree of average pain relief "response") for different dosages of a drug. While a few points on the curve are established by clinical studies, the remainder are *extrapolated,* and not proven. According to the Commission,

> even assuming that the curve as a whole has been established, the evidence indicates that above 600 mg. the curve is either very shallow or levels off to a plateau (Kantor, Tr. 3573; Lasagna, Tr. 4881). In other words, a substantial increase in dosage is necessary to produce even a small increase in pain relief (Kantor, Tr. 3573; Azarnoff, Tr. 642; F. 257), yet Anacin contains only 150 mg. more aspirin than common aspirin. Indeed, several dose-response studies showed *no* statistically significant differences in pain relief for dosages greater than 600 mg. (F. 246-55). Thus, the aspirin dose response curve cannot establish the superiority of 800 mg. of aspirin over 650 mg., or, consequently, the superiority of Anacin over aspirin (or other analgesic products).

App. 385, footnotes omitted. ("F." refers to the ALJ's findings). The Commission's treatment of the dose-response curve is well supported by substantial evidence on the record.[19]

A number of expert witnesses testified that Anacin's superior efficacy has not been established, and some expressed the view that Anacin was *not* superior. *See* App. 392. Far from concluding that Anacin's superiority had been proven, the ALJ suggested that Anacin might be less effective than "ordinary" aspirin. The possibility that the caffeine in Anacin could actually *heighten* awareness of pain was not ruled out. App. 288. Moreover, there was evidence that caffeine exacerbated aspirin's gastrointestinal side effects, App. 288, and "in terms of chronic use, the record evidence strongly suggest[s] that more aspirin may be worse [in its side effects] than less aspirin." App. 285.

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[18] It should be noted that "[e]valuation of conflicting reports as to the reputation of drugs among experts in the field is not a matter well left to a court without chemical or medical background," *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653, 93 S.Ct. 2488, 2494, 37 L.Ed.2d 235 (1973).

[19] The Commission also found wanting the evidence that Anacin is equally as effective as Darvon Compound 65 (the leading prescription analgesic), and the evidence that a regular dosage of aspirin is not as effective as the Darvon Compound. Thus, Anacin's superiority to regular aspirin was not established by the studies allegedly showing Anacin's equivalence to the Darvon product, and would not have been established even if Anacin *had* been proved to be Darvon Compound 65's equal. App. 386.

There are numerous appellate decisions upholding the Commission's right to require substantiation of advertising claims. In a case involving non-prescription weight-reducing tables, *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980), the court refused to strike down an order prohibiting, among other things, representations that *any* product of the advertiser could achieve *any* result, "unless the representation is, when made, substantiated by competent scientific and medical tests and studies." This prohibition was more far-reaching than Part I(A) of the present Order in two respects. First, **[693]** it applied to *any* of Porter & Dietsch's products, although misrepresentations had been found with respect to only one. Part I(A) of the Order here applies only to AHP's non-prescription drug products. Second, all representations as to "results" were encompassed, not merely claims to superior safety and effectiveness, even though only one "result" (automatic weight loss) had been deceptively claimed.[20]

D. Due Process and Part I(B) of the Order

[5] Although AHP is correct that there was some vacillation at the administrative level as to the genesis of the theory undergirding Part I(B) of the Order, it cannot be said that AHP was thereby denied administrative due process. AHP charges that the theory of liability on which the relevant section of the complaint relied, and on which evidence was taken at the hearing, was wholly different from the theory on which the Commission predicated Part I(B) of the Order.[21] AHP maintains that it was prevented from defending itself against the charge on the basis of which it was found liable, because it lacked notice and because the ALJ excluded relevant evidence. More specifically, the argument is that Part I(B) of the Order (the "substantial question" section), which forces AHP either to reveal the existence of a substantial question about the superiority of its products or

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[20] Other recent cases allowing the Commission to impose substantiation requirements on advertisers include *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982); *Litton Industries, Inc. v. FTC*, 676 F.2d 364 (9th Cir. 1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 481, 62 L.Ed.2d 406 (1979); *Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976); *National Dynamics Corp. v. FTC*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993, 95 S.Ct. 303, 42 L.Ed.2d 265 (1974); and *Firestone Tire & Rubber Co. v. F.T.C.*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112, 94 S.Ct. 841, 38 L.Ed.2d 739 (1973).

[21] AHP appears to base its contention on 5 U.S.C. § 554(b)(3), which entitles respondents in administrative proceedings to be "timely informed of . . . the matters of fact and law asserted." *See Rodale Press, Inc. v. FTC*, 132 U.S.App.D.C. 317, 407 F.2d 1252, 1256 (1968) ("[I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change.") (citations omitted).

to cease advertising such superiority, was premised on the "reasonable basis" theory, even though the complaint was brought under the "substantial question" theory, and even though the ALJ refused to accept evidence that would have been relevant under the "reasonable basis" proposition.

The "reasonable basis" doctrine of *Pfizer Inc.*, 81 F.T.C. 23 (1972), is that advertisers must possess and rely on an adequate "reasonable basis" for their claims. The Commission has supported this standard on the grounds that "[d]eception derives from the failure to disclose to consumers the material fact that an affirmative product claim lacks the support that would be presumed absent some qualification of it." App. 390, n. **. *Pfizer* treated the question of "what constitutes a reasonable basis [as] essentially a factual issue." It listed a number of considerations in resolving the issue in particular cases but remarked that "there may be some types of claims for some types of products for which the only reasonable basis . . . would be a valid scientific or medical basis." 81 F.T.C. at 64. AHP seems to concede the validity of the reasonable basis theory.

In the Commission's complaint against AHP, it alleged that there was a "substantial question" whether the claimed superiority for Anacin and APF had been proven or established, and that failure to set forth this substantial question in advertisements claiming superiority was misleading. Complaint counsel did not deny that there was a "reasonable basis" for AHP's superiority claim but urged that the existence of a "substantial question" nevertheless rendered the advertisements misleading. The ALJ allowed both sides to present whatever they considered relevant under the "substantial question" doctrine, but excluded "reasonable basis" evidence. He ultimately found, and the Commission agreed, that a substantial question about the superiority **[694]** of Anacin and APF existed in the absence of two well-controlled clinical studies supporting their superiority, and that, in the context of this case, failure to disclose this substantial question was misleading. AHP was not denied an opportunity to introduce evidence either as to when a substantial question exists in the medical-scientific community, or as to whether, in this case, failure on the part of the manufacturer to reveal a substantial question was misleading.

AHP contends nevertheless that the ALJ and the Commission denied it due process. It asks us to view the ALJ's and the Commission's express reliance on the "substantial question" idea as a subterfuge designed to hide reliance on the "reasonable basis" theory. As evidence that the ALJ based his decision on the "reasonable basis" doctrine, AHP considers it sufficient to note the following statement from the ALJ's lengthy opinion: "[a]gainst this background, what is the reasonable level of substantiation required under the fairness doctrine for a claim that Anacin is more effective than aspirin . . . ?" App. 303. It is not clear why this passage is thought to be incongruent with the "substantial question" test. The ALJ was considering how much support AHP must have, in the circumstances of this proceeding, for its advertising claims of Anacin's effectiveness. His conclusion was that, if the advertisements are not to be either false or unfair to consumers, Anacin must pass the "substantial question" test:

> The challenged representation . . . that it has been established that a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic, is not only unfair to consumers but also false since the greater effectiveness of Anacin has not been scientifically established. In light of the evidence, there existed a substantial question recognized by experts qualified by scientific training and experience to evaluate the efficacy of such drugs as to the validity of such representations.
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> * * * * * * *
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> [T]he consumers of OTC analgesic products are entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a sufficient kind and level of substantiation for the claim. In the circumstances of this case, the only sufficient substantiation for the claim is that the claim is accepted as established by the medical-scientific community. The record is clear that, with respect to OTC [over the counter, i.e., non-prescription] internal analgesic products, the medical-scientific community requires two or more well-controlled clinical studies.

App. 184, 303-04. The ALJ's use of the term "reasonable" in framing the issue in no way implies a reliance on the "reasonable basis" test.

In affirming the ALJ, the Commission took a slightly different position regarding the provenance of the "substantial question" doctrine. Though complaint counsel had characterized "substantial question" as a new idea, and the ALJ appears to have agreed, the Commission reasoned that the theory was a logical application of well-established principles.

> The conclusions set forth herein are merely an elaboration, in the specific context of drug products, upon well-established principles of advertising law requiring that advertisers possess and rely upon a reasonable basis for affirmative product claims. *Pfizer, Inc.*, 81 F.T.C. 23, 60-65 (1972). It has repeatedly been held that failure to possess a reasonable basis for advertising claims is a deceptive practice. [citations omitted] Deception derives from the failure to disclose to consumers the material fact that an affirmative product claim lacks the support that would be presumed absent some qualification of it. The appropriate measure for such support is, of course, to be determined in light of the particular claims made and the products for which they are made. For reasons noted in the text, we believe that such support in the case of drugs consists of the two or more well-**[695]**controlled clinical studies deemed necessary by a broad spectrum of relevant experts to justify assertions as to drug performance.

App. 390, n. **.[22] That is, the Commission determined that in some circumstances an advertiser lacks a "reasonable basis" for its claim where there is a substantial question about the truth of the claim. Given this determination, no evidence purporting to establish a "reasonable basis," and not purporting to eliminate the existence of a "substantial question," could have been relevant.[23]

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[22] The fact that the Commission characterized the "substantial question" test as a logical elaboration of the "reasonable basis" theory does not indicate that the Commission decided the case on the general "reasonable basis" theory, as AHP alleges. In fact, the only dissenter from Part I(B) of the Commission's order based his dissent on his disapproval of the Commission's application of the very rigid, as he perceived it, "substantial question" test. App. 357-58. *But see* text at 701-702 (rejecting Commissioner Clanton's characterization of the test as rigid). It is not alleged that the Commission abused its discretion by announcing the "substantial question" test in an adjudication rather than in a rulemaking proceeding. *Compare Ford Motor Company v. FTC*, 673 F.2d 1008 (9th Cir. 1982), *appeal docketed*, 459 U.S. 999. 103 S.Ct. 358, 74 L.Ed.2d __.

AHP also asserts, as a procedural objection, that the Commission's expert witnesses were not asked about the "substantial question" issue. Whether this allegation bears on the Commission's procedure, or on the merits of Part I(B), it is not persuasive. There was an impressive array of testimony supporting the Commission's decision as to the procedures the medical-scientific community considers sufficient to establish a claim to superiority for an analgesic. Even if complaint counsel failed to use the actual phrase "substantial question" in examining the witnesses it is unreaslistic to suppose that AHP could have failed to realize that the experts were being queried as to when, in the complaint's terminology, a "substantial question" could be said to exist in the medical community regarding the superiority of an analgesic.

E. The Merits of Part I(B) of the Order

[6] Because we do not vacate Part I(B) on due process grounds, it is necessary to address AHP's substantive challenge to this provision. Part I(B) deals with advertisements which claim that the products are superior, but which do not make overt claims that superiority has been proven. It directs AHP, when making unequivocal claims of superior effectiveness or freedom from side-effects for non-prescription analgesics, to verify such claims with two well-controlled clinical studies, or to reveal that there exists a substantial question about their truth.[24] Another alternative available to AHP is to cease claiming superiority.

AHP does not deny that affirmative product claims can be misleading if not supported by adequate proof. Nor do we understand AHP to take exception to the Commission's right to order that the advertisements of a violator disclose the absence of the appropriate level of proof for a product claim. AHP's objections to Part I(B), analogous to those made against Part I(A), are, first, that the advertisements in question did not make the claim which the Commission attributes to them, i.e., the claim of superiority, and second, even if this claim had been made, there existed sufficient supporting evidence to render it non-deceptive.

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[23] Counsel for AHP at oral argument contended that AHP was prejudiced when the ALJ precluded AHP from introducing "cost benefit evidence," such as evidence concerning "the costs both in dollar terms and safety terms in requiring or not requiring certain kinds of evidence" to support advertising claims about these drug products. Transcript 15. *See also* Petitioner's Br. 8, 22-3. Clearly such evidence does not address whether AHP's product claims were open to "substantial question."

[24] AHP may use the phrase "open to substantial question" or "has not been proven." If it chooses, AHP may instead employ any other language, provided that it can show that the proper message is being effectively conveyed to the intended audience.

1. Were the superiority claims made?

The advertisements lend themselves to the Commission's interpretation, and there is expert testimony in favor of this read**[696]**ing.[25] As AHP admits, it represented that Anacin contains "more analgesic content than regular or regular buffered aspirin tablets," "twice as much of the pain-reliever recommended most by doctors," as the other leading "extra-strength" tablet, and "the analgesic ingredient most recommended by doctors."[26] Also acknowledged is that AHP represented that APF's "'double-buffering' makes it gentle to the stomach." Petitioner's Br. 5.

As explained more fully in connection with Part II of the Order, these particular representations—although technically correct—were nevertheless misleading. The Commission's reasoning that a claim of more pain *reliever,* which the advertisements explicitly make, would be read by consumers as a claim of more pain *relief,* seems compelling. Not only credulous purchasers are apt to conflate the idea of more pain reliever with that of more pain relief, but as the Commission explains in its brief, even rational and careful consumers will be apt to place such an interpretation on the advertisements (Respondent's Br. 21 n. 14):

> [I]f the presence of more pain reliever in a product did not result in greater pain relief (as may well be true of Anacin), disclosure of the extra amount could be a clear liability, since consumers would logically expect that it contributed to an increased price. Since rational consumers do not expect a rational advertiser to highlight the drawbacks in its own product, and since the ads in question deal solely with the question of comparative analgesic efficacy, the only possible message that rational consumers can draw from American Home's incessant statements about Anacin's extra pain reliever is that Anacin is more efficacious.
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> The advertisements thus support the interpretation that superiority to "regular aspirin" and to "the leading extra strength tablet" was claimed.[27] As for APF, the express claim that APF is gentle to the stomach because of its "double-buffering" or because it is "microfined" clearly convey[s] the message that APF has a larger amount of buffering action than other buffered products and is finer than others and that, therefore, it is the gentlest of all OTC analgesic products on the market.

App. 265-66, citing advertisements.[28]

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[25] Moreover, as noted above, there is empirical evidence that consumers in fact have an image of Anacin's superiority. It is likely that this image derives from advertising, even if it cannot be determined from the record which specific advertisements gave rise to this consumer belief.

[26] Although the advertisements prescribed by Part I(B) are not the ones that made explicit claims that superiority has been proven, many of the misleading advertisements that in the Commission's view justified Part I(B) did "mention briefly that 'doctors recommend' or 'doctors specify' Anacin pain reliever." Such phrases "can contribute somewhat to an aura of scientific authority." App. 387, n. **.

[27] As noted *infra* 702-703, the Commission can properly read a claim of superiority to the "leading extra-strength" tablet as a claimed superiority to all products in the field.

[28] We follow the parties in devoting most of our attention to Anacin rather than APF. The ALJ's review of the inconclusive evidence that APF causes less gastric upset than regular aspirin is in App. 190-94 and 290-92.

2. *Were the superiority claims deceptive?*

More difficult than the question whether superiority claims were made is whether the superiority claims were deceptive. In this regard, the Commission's central passage is the following:

> When an analgesic advertiser claims its product to be superior in performance, even without the additional explicit claim that it has been so proven, it is reasonable for consumers to construe that claim to be the assertion of a fact that is generally accepted, within the scientific community, as established. By their nature, therapeutic drug products raise special public health concerns, in light of the risks associated with their use.

App. 387-38, footnote omitted.

We do not decide whether such reasoning would justify a "substantial question" provision whenever advertisements make *any* affirmative product claims for *any* drugs. **[697]** In the present case, the Commission declined to apply this reasoning so broadly, and limited Part I(B) to AHP's *non-prescription analgesics* and to claims of *superior effectiveness or freedom from side effects.* The Commission expressly recognized the possibility that comparative claims for some non-prescription drugs might require less substantiation than is demanded here. *See* App. 407.

The essential idea supporting Part I(B) is readily comprehensible, despite AHP's attempts to portray this provision as arcane. When a factual, verifiable proposition is unequivocally asserted in an advertisement, the Commission's view is that a consumer is entitled to assume that the appropriate verification has been performed. It cannot be stressed too emphatically that claims of superior effectiveness or freedom from side effects for a drug are factual, testable claims. When an article of clothing is proclaimed to be more aesthetically pleasing than competitors' products, consumers cannot expect that this quality of the clothing has been verified. But when a drug is held out to consumers as superior, this is as much a factual representation—even if the verification procedures are more difficult to perform—as a claim that a product is pure gold, or weighs one pound, and consumers can be expected to read it as such.

[7] Failure to disclose that a claim regarding a drug product lacks an *appropriate* level of support, when such support is non-existent, is misleading. AHP's principal attack is at bottom nothing more than a disagreement as to how much proof is appropriate to prevent a claim from having the capacity to mislead. Although it is unclear what quantity or quality of proof AHP would consider sufficient.[29] AHP clearly regards the Commission's stand-

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[29] It regards as sufficient "substantiation considered acceptable by responsible medical experts." Petitioner's Br. 29. But this either supports the Commission's position or else is vacuous. The Commission found, on the basis of powerful evidence, that the medical community would not consider the substantiation for an unequivocal claim of superiority to be "acceptable" unless it included more than one clinical test of the type specified in Part I(B).

ard here—that is, two clinical studies satisfying a number of criteria—as excessive. Thus, AHP's challenges to the "substantial question" provision is essentially to a factual determination by the Commission that certain advertisements, in the absence of a designated type of proof, are deceptive.

We are required to give deference to Commission findings that advertisements are deceptive. There are strong reasons why the Commission's demand for an especially high level of proof for advertising claims is justifiable under the facts of this proceeding. These reasons can be grouped into two categories: first, those based upon the special nature of the product category; and second, those relating to the particular facts of AHP's conduct.

Pervasive government regulation of drugs, and consumer expectations about such regulation, lend to drug claims all the more power to mislead. The Commission's reasoning on this point (see especially App. 389 n. **) is similar to that approved in *Simeon Management Corp. v. FTC, supra,* 579 F.2d at 1145 (footnote omitted):

> The Commission found that (1) some consumers will reasonably believe that the government exercises control over the promotion and use of prescription drugs; (2) this belief is intensified by the advertisements' representations that the weight loss treatments are safe, effective and medically approved; and (3) the representations may therefore reasonably lead consumers into the mistaken belief that the claims of safety and effectiveness are based not on the advertiser's own opinion, but on a determination by the FDA. It further found that in view of the public's belief that the government strictly regulates drugs, the fact that the treatments involve administration of a drug lacking FDA approval for such use may materially affect a consumer's decision to undergo the treatment. Accordingly, the Commission declared that the failure to disclose that the weight reduction treatments involve injection of a drug lacking FDA approval for such use **[698]** renders the advertisements deceptive and thus in violation of § 5 of the FTCA.

The Commission in these proceedings reasonably extended the ideas approved in *Simeon* from prescription to non-prescription drugs and from absolute representations about safety and effectiveness to comparative representations. Non-prescription as well as prescription drugs are subject to the FDA's requirements that absolute safety and efficacy be demonstrated by well-controlled clinical tests. And the Commission concluded that many consumers could reasonably believe that the federal government demanded similarly high standards for claims of *comparative* effectiveness and safety as are imposed on *absolute* claims.

Of course the Commission is not committed to the unrealistic notion that consumers understand the climical details of comparative drug testing or the exact mechanisms of government regulation. It merely asserts that consumers reasonably assume that the proper governmental authorities will take steps to ensure that unqualified claims of a drug's superiority are supported by whatever proof the appropriate medical or scientific experts consider sufficient.[30]

Another consideration in favor or holding comparative effectiveness and safety claims for analgesics to high standards of substantiation is the difficulty for the average consumer to evaluate such claims through personal experience, and the consequent tenacity of advertising-induced beliefs about superiority. Several factors account for the lack of capability by consumers in this area. First, mild to moderate pain, especially headache pain, is "self-limiting"; that is, it will eventually disappear whether or not the consumer attempts a remedy. Consequently, the consumer cannot tell if relief was obtained spontaneously or as a result of the analgesic. Second, problems of memory may prevent reliable comparisons by a consumer between different preparations taken on different occasions. Third, pain varies in intensity, again undermining the reliability of any individual's judgments of comparative effectiveness. Fourth, the "placebo effect" of taking drugs ensures that many consumers will perceive relief even from totaly ineffective products. As the ALJ noted, in "clinical studies of mild to moderate pain, the placebo response rate, *i.e.*, the rate of positive responses (perceived relief) in the presence of a pharmacologically inactive drug, is commonly between 30% and 60% [citing expert witnesses]." App. 161. One expert witness "demonstrated that, even on a blinded basis, individual consumers are unable to distinguish the comparative therapeutic effect of five OTC analgesics." App. 163. Because consumers cannot accurately rate the products for themselves, advertising, and the expectations which it engenders, becomes a significantly more influential source of consumer beliefs than it would otherwise be. *See* App. 243-44.

The health risks associated with aspirin are another special feature of the product category. The larger dosages of aspirin which AHP exhorts consumers to ingest increase the dangers of adverse side effects, with little evidence that there exist any countervailing benefits. The Commission summarized some of the dangers: **[699]**

> Aspirin may cause adverse side effects such as dyspepsia for some individuals (Grossman, Tr. 828; Plotz, Tr. 1044). For others, including asthmatics, a dangerous allergic reaction to aspirin is possible. (Falliers, Tr. 3187; Moertel, Tr. 1021; Stevenson, Tr. 1474). The Report for OTC Internal Analgesics (CX 367) of the Food and Drug Administration's

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[30] As the philosopher Hilary Putnam implies, the division of labor in society (in the broadest sense) means that even when the truth of a claim is important to an individual he must often rely on the availability of experts who can verify the claim for him:

> Consider our community as a "factory": in this "factory" sill people have the "job" of *wearing gold wedding rings;* other people have the "job" of selling gold wedding rings; still other people have the job of *telling whether or not something is really gold*. It is not at all necessary or efficient that everyone who wears a gold ring (or a gold cuffink, etc.) or discusses the "gold standard," etc., engage in buying and selling gold. Nor is it necessary or efficient that everyone who buys and sells gold be able to tell whether or not something is really gold in a society where the form of dishonesty is uncommon (selling fake gold) and in which one can easily consult an expert in case of doubt. And it is *certainly* not necessary or efficient that everyone who has occasion to buy or wear gold be able to tell with any reliability whether or not something is really gold.

H. Putnam, *Meaning and Reference*, in Naming, Necessity, and Natural Kinds 125 (S. Schwartz ed. 1977).

> (FDA) advisory review panel (a panel of outside experts established by FDA to review the safety and efficacy of OTC drugs) summarizes the possible adverse side effects of aspirin, which range from massive gastrointestinal bleeding (which may be fatal) to hepatic (liver) dysfunctions (CX 367014). For example, aspirin may interfere with normal blood clotting, increase internal bleeding, cause peptic ulcers, increase the incidence of neonatal deaths, depress the central nervous system, and cause anemia. For individuals with aspirin allergies, according to the Report, ingestion of aspirin may result in shortness of breath, laryngeal swelling from anaphylactic shock, blocking of air pathways, and a sudden drop in blood pressure (*id.*).

App. 366-67, footnotes omitted. ("CX" denotes a documentary exhibit of complaint counsel.)[31]

In addition to the special features of the product, AHP's past behavior also supports the Commission's demand for a high level of proof. AHP has for many years waged advertising campaigns designed to impress upon the public the superiority of Anacin and APF. At least with respect to Anacin, there is much evidence that the campaigns had considerable success. The Commission, despite its finding of violations, decided that corrective advertising was unnecessary. It explained Part I(B) and other provisions of its order in part as a less intrusive means of undoing the damage caused by AHP's previous advertisements and as a means of keeping this proven violator from inflicting such damage in the future:

> A belief in the proven superiority of Anacin is most likely to continue if comparative claims continue to be made in Anacin advertising. But under this order, any future comparative efficacy or side effects claims must be effectively qualified—*i.e.,* corrected as to the lack of proof—unless the requisite proof actually exists, in which case there will be no further deception. Moreover, the order will prevent respondent from conveying an erroneous impression of the product's superiority (proven or not) by means of claims about the unusualness of the ingredient in the product, in that it will prohibit false unusualness claims and will require the disclosure, in many Anacin ads, of the familiar name of aspirin.

App. 418. Even if the inherent nature of the products would not in itself justify Part I(B), when the product's nature is considered in conjunction with the facts of AHP's past actions, there is ample support for this provision.

The court's have accorded the Commission wide latitude in ordering advertisers to make disclosures which limit or counteract **[700]** affirmative advertising claims. In *National Commission on Egg Nutrition v. FTC,* 570 F.2d 157, 160 (7th Cir. 1977), *cert. denied,* 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978) the Commission allowed an egg industry group to make representations concerning the relation of egg consumption to heart and circulatory disease *only if* it was "clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease." The Seventh Circuit upheld the Commission, explaining that this aspect of the order was appropriate to prevent *future* deception, even though the record did "not show a long history of deception which has so permeated the consumer mind that the 'claim was believed by consumers after the false advertising had ceased,'" *id.* at 164, quoting *Warner-Lambert Co. v. FTC,* 183 U.S.App.D.C. 230, 562 F.2d 749, 771 (1977), *cert. denied,* 435 U.S. 950, 98 S.Ct. 1575, 55 L.Ed.2d 800 (1978). The *Egg Nutrition* decision supports a provision, such as Part I(B) of the Order here, which requires that the existence of a controversy over the truth of a scientific assertion made in an advertisement be conveyed to the public. Moreover, *Egg Nutrition* upheld such a requirement even where, in contradistinction to the case at bar, there was no evidence that it was needed to serve a remedial function.

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[31] The gastrointestinal side effects are especially worrisome. The ALJ found it "evident from the record that aspirin poses a serious public health problem, in terms of gastrointestinal effects, to certain groups of individuals in the population," App. 199. Although aspirin enjoys a favorable "benefit-to-risk ratio," and massive gastrointestinal bleeding is relatively rare, "the mortality rate associated with this condition is 4 to 10%, including those persons whose bleeding was induced by aspirin . . ." App. 198-99. A "conservative estimate" is that "aspirin ingestion results in 10 out of every 100,000 users, developing a gastric ulcer, requiring hospitalization," App. 296. One study "estimated that one-eighth of all gastric ulcers were aspirin-related," App. 296. There is even a specific kind of ulcer not seen in the absence of aspirin. App. 199, 296. AHP's brief insists that the Commission conceded aspirin's safety. But while the Commission acknowledges that aspirin is "generally safe" (e.g., App. 303), at all steps of these proceedings attention has been called to the serious aspirin-related health risks that exist for a "significant" number of individuals (e.g., App. 368). The advertisements for APF would appear to raise special problems since they unequivocally represent that APF is "gentle" to the stomach—indeed, "so gentle you can take it on an empty stomach" (e.g., App. 611)—and so may persuade even individuals who know they should avoid aspirin, and realize that APF contains aspirin, to use this product.

A similar approach was taken by the Supreme Court in *Colgate-Palmolive,* when it affirmed a Commission finding that a televised "test" of a product's effectiveness is misleading because of the undisclosed substitution of a prop for a genuine component in the purported test. There were several possible ways of conforming to the Commission's order: the violator might seek to advise the public that the test is a simulation, an alternative that the violator alleged was impractical; the violator might televise real tests, a practice also alleged to be impractical; or the violator could simply do without such demonstrations in its advertisements. The alternatives open to AHP under Part I(B) would seem to be similar: it can reveal that there is a substantial question; it can perform the clinical tests that would, if successful, eliminate the substantial question; or it can eliminate its superiority claims.

Warner-Lambert, supra, 562 F.2d at 759, considered it "well established" that "under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts." *Warner-Lambert* cited *Ward Laboratories, Inc. v. FTC,* 276 F.2d 952 (2d Cir.), *cert. denied,* 364 U.S. 827, 81 S.Ct. 65, 5 L.Ed.2d 55 (1960) and *Keele Hair & Scalp Specialists, Inc. v. FTC,* 275 F.2d 18 (5th Cir. 1960), which upheld Commission orders that sellers of baldness treatments must make clear that their products would have no effect on most baldness.[12]

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[12] Similar disclosure requirements for other types of products were upheld in *Feil v. FTC,* 285 F.2d 879 (9th Cir. 1960) and *J.B. Williams Co. v. FTC,* 381 F.2d 884 (6th Cir. 1967). *Alberty v. FTC,* 86 U.S.App.D.C. 238, 182 F.2d 36, *cert. denied,* 340 U.S. 818, 71 S.Ct. 49, 95 L.Ed. 601 (1950), refused to sustain a similar order, but the D.C. Circuit has radically limited, if it has not overruled, *Alberty. See Warner-Lambert,* 562 F.2d at 759 n. 52.

Although it somewhat modified a Commission order, *Warner-Lambert* affirmed that portion of the order which required the company to disclose in future advertisements for Listerine that this product "will not help prevent colds or sore throats or lessen their severity," *id.* at 752. Although the order was less burdensome than Part I(B) here in that it automatically terminated after a specified amount of advertising money had been spent by the violator, it was clearly more of an encumbrance in that, as a genuine "corrective advertising" requirement, it demanded disclosure in future advertisements regardless of the content of those advertisements. While Part I(B) has a corrective purpose, it is not a corrective advertising requirement in the narrow sense because AHP can escape its strictures by the simple expedient of ceasing to claim superior effectiveness or freedom from side-effects for its non-prescription analgesics. The Commission, recogniz**[701]**ing that corrective advertising of the sort upheld in *Warner-Lambert* can be a significant burden on a violator, refused to order it in the present case. *See* App. 313-14 and 418.[33]

Commissioner Clanton, who concurred with the remainder of the Commission on all other points, dissented from Part I(B) of the Order. He acknowledged that it was

> true, of course, that the Commission need not refer to consumer surveys or similar extrinsic evidence to interpret the meaning of an advertisement . . . Similarly, actual deception need not be shown by complaint counsel to carry its burden of proof. It is necessary only that the advertisement have the tendency or capacity to deceive.

App. 355, citations omitted. Commissioner Clanton also agreed that "consumers generally regard product performance claims to have some reasonable support." App. 358. Indeed, he granted that "reasonable support" in the present case might very well be medical or scientific proof; in other words, that Part I(B) of the order might well be justifiable. His principal objection was that the majority's approach was too inflexible. In his view, the Commission had adopted a *per se* rule that any comparative drug claim—and perhaps all non-comparative drug claims, and even many comparative claims outside the drug area—must be supported by scientific proof. But, according to Clanton, the Commission should examine drug claims on a case by case basis to determine whether they must be supported by scientific proof in order to be lawful under the statute.

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[33] *Simeon Management Corp., supra,* is another recent appellate court refusal to set aside a Commission finding that, in the absence of certain disclosures, advertisements were in violation of the Federal Trade Commission Act. The advertisements at issue stressed the safety and effectiveness of the advertisers weight loss program. Although the advertisements made no additional claim that any government agency had *approved* the safety or effectiveness of the program, and despite the lack of any evidence that consumers were actually deceived about this, the "Commission found that the advertisements could reasonably lead consumers to believe that the claim [sic] of safety and effectiveness are based on a determination by the appropriate administrative agency." 597 F.2d at 1146 (footnote omitted). The Court in affirming argued that "[i]n view of the currently pervasive level of governmental regulation, particularly in the medical field, we cannot say that this determination is unreasonable, arbitrary, capricious or an abuse of discretion," *id.* at 1146.

See also the "substantiation" cases noted *supra* typescript at 22, especially *Porter & Dietsch* and *Firestone Tire.* Part I(B) is both a "substantiation" provision and a "disclosure" provision in that it requires AHF to substantiate its claims to disclose the lack of substantiation, or else to cease making the claims. *Porter & Dietsch,* 605 F.2d at 306-7, in addition to affirming a substantiation requirement, sustained in modified form a warning that the Commission required the company to include in all advertisements for certain products. In contradistinction to this the Commission here has not required any warning at all, and has required affirmative disclosures only to the extent certain claims are made. In *Firestone Tire,* 481 F.2d at 251, the Sixth Circuit upheld a finding that an advertising claim that tires "stop 25% quicker" was misleading "without substantial scientific test data to support it," regardless of the absence in the advertisements of any allusion to scientific or other proof of the claim. The order there upheld is thus quite similar to Part I(B) here.

We do not understand the Commission to have adopted such a rigid rule. Although there is some broad language in the opinion to support Clanton's concern, the Commission gave attention to the particular nature of AHP's advertisements, to the specific facts regarding the products involved, and to the effects of AHP's past deceptions. Even if it would have been preferable for the Commission to have had more evidence of consumer beliefs, this would not be a ground to modify or vacate its order. In the very case at hand, the Commission majority declined to impose the "substantial question" provision so relentlessly. Part I(B) applies only to non-prescription analgesics, not to prescription drugs or other non-prescription drugs, or any products other than drugs. Moreover, it applies only to comparative claims of effectiveness and freedom from side effects. If an appeal arises in which it appears that the Commission has employed a "substantial question" provision in an unyielding fashion, without regard for the facts of the case, that per**[702]**haps will be an appropriate occasion to consider modifying an order.[34] It is worth noting that Clanton's more particular objection to the "substantial question" provision in the order here under review offers no comfort to AHP. He suggests that, so far from Anacin's superiority being proven, "most researchers would simply dismiss [AHP's] purported substantiation as inadequate to establish anything scientifically." App. 38.

III. Part II of the Order

Part II of the Order requires AHP to cease claiming falsely that its non-prescription drug products have special ingredients (Part II(A)), or have more of an active ingredient than do competing products (II(B)). AHP must also stop misrepresenting surveys or tests (II(C)), and must abandon all non-comparative claims of effectiveness or freedom from side effects lacking a reasonable basis (II(D)). Parts II(C) and II(D), like the other requirements of Part II, encompass all of AHP's non-prescription drug products. AHP objects that Parts II(A)-(C) are unsupportably broad and should be narrowed to Anacin and APF. Part II(D) is in AHP's view so vague that it must be vacated in full and not merely limited.

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[34] Counsel for the Commission made it clear at oral argument that this Court is not being asked to decide upon the validity of a rigid rule. Counsel suggested that, while Part I(B) is reasonable, other alternatives are also reasonable, and the Commission might reach a different result in the companion cases involving AHP's competitors. If inconsistent results are reached, AHP can request conformed treatment. *See* 710-711; and Respondent's Br. 27 n. 18.

A. The Findings of Fact Underlying Part II of the Order

Although AHP mounts no challenge to the findings on which the Commission seeks to base Part II, it is important to understand those findings in order to determine whether they warrant as broad an order as was issued. At no point in the proceedings has AHP attempted to defend the notion that Anacin or APF possess special or unusual analgesic ingredients; it is clear that the only analgesic in either product is aspirin. Yet AHP's expert witness, Dr. Smith, acknowledged that the advertising campaign was designed to differentiate the products from ordinary aspirin, and this was confirmed by the officer responsible for advertising and marketing Anacin. (See App. 363-64, citing testimony of Smith and DeMott). One of the offending advertisements reads:

> Anacin tablets are so effective because they are like a doctor's prescription. That is, a combination of ingredients. Anacin contains the pain reliever most recommended by doctors plus an extra active ingredient not found in leading buffered aspirin. . . . The big difference in Anacin makes a difference in the way you feel.

(Quoted in App. 364).[35] APF advertisements employed similar techniques (*see* App. 365). The Commission concluded that affirmative misrepresentations of the product's uniqueness, combined with the failure of the advertisements to reveal that the products contained aspirin, had the capacity to mislead consumers. In addition to its own reading of the advertisements, the Commission relied on the expert testimony of Dr. Ross and on several consumer surveys showing that may consumers were unaware of the presense of aspirin in Anacin, and believed that Anacin was superior to aspirin.[36]

AHP's advertising that Anacin and APF possessed more of an active ingredient than did their competitors' products was, similarly, an attempt at false product differentiation. One series of television advertisements announced that the consumer shown on camera "found medically proved Anacin **[703]** overpowers headache pain. For most headaches all three leading pain relievers reach an effective level in your bloodstream in minutes. But in the final analysis the highest level is reached by Anacin. This higher level is the extra pain reliever Anacin provides for your headache." App. 513-516. The ALJ found that a claim of superiority over the "leading" products in a field would be understood by consumers as implying superiority over the entire category, a principle with which AHP's expert, Dr. Smith, seems to have agreed to a large extent. *See* App. 126-27 and 258; and 371-72.

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[35] Many other advertisements in a similar vein could be cited. See App. 124-26 and 138-39.

[36] The Commission, in discussing the materiality of the deception, stressed the special dangers that can arise when consumers who should avoid aspirin are misled as to the nature of Anacin and APF. See supra 715.

Yet other products on the market possess as much aspirin as Anacin and four widely available products—APF, Arthritis Strength Bufferin, Cope, and Midol—contain *greater* amounts. App. 157. Even more misleading are those advertisements that convey the impression that Anacin has *twice as much* pain reliever as all other non-prescription products. For example, one advertisement had it that

> 2 Anacin Tablets have more of the one pain reliever doctors recommend most than 4 of the other leading extra strength tablets . . . . 2 Anacin contain more of this specific pain reliever than 4 of the others.

Another advertisement proclaims:

> Anacin's fortified formula has more of this specific pain reliever than any other leading headache tablet. In fact, Anacin is formulated twice as strong in the amount of this specific pain reliever as the other leading extra-strength tablet.

The ALJ quoted these two advertisements, along with several others. App. 124-25. *See* App. 194. Despite the implication that Anacin has twice as much pain reliever as any other non-prescription analgesic (or at least as any other that is readily available), as previously noted, four commonly obtainable products actually contain more pain reliever than Anacin.

Part II(C) of the Order prohibits AHP from misrepresenting in certain ways any test, study or survey. The findings that form the predicate of this provision were that AHP misrepresented tests comparing Anacin with other analgesics (App. 373-75 and 412), as well as misrepresenting a survey of doctors (App. 399, 412; *see* App. 195). While Part II(C) applies to all of AHP's non-prescription drug products, the Commission limited it "to conform to the types of misrepresentations that respondent made: namely, efficacy and freedom from side effects claims." App. 412. *Cf. Litton, supra,* 676 F.2d at 371-72.[37]

Although Part II(D) of the Order is sweeping—prohibiting any non-comparative representation, without a reasonable basis, of the effectiveness or freedom from side effects of a non-prescription drug product—the finding which supports it is quite narrow. The only non-comparative claim of effectiveness or freedom from side effects, lacking a reasonable basis, which the Commission specifically found was the advertising message that Anacin offers relief from tension. To point out that this finding is relatively narrow is of course not to suggest that it was unimportant or unsupported by the evidence. Indeed, AHP has declined to challenge here the finding regarding tension relief.[38] [704]

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[37] The misrepresentations as to tests and surveys formed part of the Commission's case in support of Part I(A) of the order. These misrepresentations were discussed above, in connection with Part I(A). Since AHP does not appeal part II(C) as applied to Anacin and APF but does appeal part I(A), its position would seem to be that the test and survey claims were properly found to be deceptive, although not deceptive by reason of making any claim that Anacin's or APF's superiority had been established.

The advertisements in question—and there were a great many—represented that Anacin alleviates various tension-related conditions such as nervousness, tension, stress, fatigue, and depression. There was not the slightest basis for such representations. AHP claimed before the Commission that the advertisements merely made the true claim that Anacin will help *tension-associated pain,* but has chosen to abandon this contention on appeal. Two print advertisements in the record, both entitled "When Boredom and Emotion Fatigue Bring on 'Housewife Headache'", advised consumers:

> Making beds, getting meals, acting as family chauffeur—having to do the same dull work day after day—is a mild form of torture. This can bring on nervous tension, fatigue and what is now known as 'housewife headache'. For this type of headache you need strong yet safe relief. So next time take Anacin. Anacin gives you *twice as much* of the stong pain reliever doctors recommend most as the other leading extra strength tablet. Minutes after taking Anacin, your headache goes, so does its nervous tension and fatigue. Lets you feel better all over. Despite its strength, Anacin is safe taken as directed. It doesn't leave you depressed or groggy. Next time take *Anacin* Tablets!

App. 535, 536; *see also* App. 534, 537-39. Television advertisements made the same claims, conjoined with depictions of stressful situations. *See* App. 397-98. It is not surprising that, as AHP's own survey showed, consumers exposed to such advertising were far more likely to identify "tension/nervous tension" than "tension headache" as the symptom relieved by Anacin. *See* App. 398.

B. The Commission's Discretion To "Fence In" Violators

[8,9] Primary responsibility for fashioning orders rests with the Commission. *FTC v. National Lead Co.,* 352 U.S. 419, 429, 77 S.Ct. 502, 509, 1 L.Ed.2d 438 (1957). As the Supreme Court observed in *FTC v. Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952)(footnote omitted):

> In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

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[38] Although AHP has not requested that Part IV of the Order (which specifically forbids tension relief claims for Anacin) be vacated, it mentions that "[b]ecause the challenged tension relief claims ceased in 1973 . . . it is questionable whether *any* order is necessary at this time." Petititioner Br. 49 n. 77. But the claims ceased only after proceedings has been brought against AHP, so the discountinuance cannot be considered voluntary. *See Oregon-Washington Plywood Co. v. FTC,* 194 F.2d 48, 51 (9th Cir. 1952). Even if the advertisements had been voluntarily withdrawn, the Commission would not necessarily lack the authority to issue an order. *See Fedders Corp., supra,* 529 F.2d at 1403.

More succinctly, "those caught violating the Act must expect some fencing in." *National Lead, supra,* 352 U.S. at 431, 77 S.Ct. at 510. The necessity for allowing the Commission to construct broad remedial orders results in part from the fact that "there is no limit to human inventiveness in this field," *Sears, Roebuck, supra,* 676 F.2d at 391, quoting H.R.Conf.Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914).

We are cautioned that "courts should not 'lightly modify' the Commission's orders," *Colgate-Palmolive, supra,* 380 U.S. at 392, 85 S.Ct. at 1046. The rule set forth in *Jacob Siegal Co. v. FTC,* 327 U.S. 608, 612-13, 66 S.Ct. 758, 760, 90 L.Ed. 888 (1946), is that the Commission "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." The *Jacob Siegal* "reasonable relation" test has been applied in numerous cases, e.g., *Colgate-Palmolive, supra,* 380 U.S. at 392, 85 S.Ct. at 1046; *National Lead, supra,* 352 U.S. at 428, 77 S.Ct. at 508; *Ruberoid, supra,* 343 U.S. at 473, 72 S.Ct. at 803; *Consumer Products of America Inc. v. FTC,* 400 F.2d 930, 933 (3d Cir. 1965); *see also Beneficial, supra,* 542 F.2d at 618; and *Bakers Franchise Corp., supra,* 302 F.2d at 262.

In *Colgate-Palmolive,* 380 U.S. at 392, 85 S.Ct. at 1046, however, the Supreme Court has

> warned that an order's prohibitions "should be clear and precise in order that they may be understood by those against whom they are directed," [citation omit**[705]**ted] and that "[t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." [citation omitted]

Orders worded in such general language that serious questions as to meaning and application exist "are disfavored because they alter the scheme of penalties and enforcement procedures defined by the Act without specific identification of the proscribed conduct." *Standard Oil, supra,* 577 F.2d at 661. When an advertiser is accused of violating the statute it receives a full hearing before the Commission, and if the Commission finds against the advertiser, a cease and desist order will issue. In contrast, an accusation that a Commission *order* has been violated is heard in district court, short-circuiting the agency hearing process envisioned by the statute and subjecting the advertiser to harsher penalties. *See id.* at 661; and *Litton Industries, supra,* 676 F.2d at 371. *Colgate-Palmolive,* requires only, however, that the crucial terms of an order be "as specific as the circumstances will permit." 380 U.S. at 393, 85 S.Ct. at 1047.

The Commission must, therefore, adhere to two rules when attempting to fence in a violator. Under *Jacob Siegal,* there must be a reasonable relation between the violation and the order, under *Colgate-Palmolive,* an order must be sufficiently clear and precise to be understood by the violator, although the order need be no more definite than circumstances permit.

"Fencing in" often takes the form, as in this case, of a multi-product order.[39] Thus, in *Colgate-Palmolive,* the Supreme Court sustained an all-product order on the basis of only three advertisements for a single product:

> [W]e find no defect in the provision of the order which prohibits respondents from engaging in similar practices with respect to "any product" they advertise. The propriety of a broad order depends upon the specific circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. In this case the respondents produced three different commercials which employed the same deceptive practice. This we believe gave the Commission a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise. We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements.

380 U.S. at 394-95, 85 S.Ct. at 1047-48, footnote omitted.[40] **[706]**

Noting that "fencing-in provisions are prophylactic," a recent decision of the Ninth Circuit asserted that "the ultimate question is the likelihood of the petitioner committing the sort of unfair practices [the provisions] prohibit," *Litton Industries, supra,* 676 F.2d at 370. In answering this ultimate question, that court in another recent case summarized the relevant considerations:

> Where a fair assessment of an advertiser's conduct shows a ready willingness to flout the law, sufficient cause for concern regarding further, additional violations exists. Two factors or elements frequently influence our decision—the deliberateness and seriousness of the present violation, and the violator's past record with respect to unfair advertising practices. *Standard Oil Co. of California v. FTC,* 577 F.2d 653, 662 (9th Cir. 1978). Other circumstances may be weighed, including the adaptability or transferability of the unfair practice to other products. *See Colgate-Palmolive Co.,* 380 U.S. at 395, 85 S.Ct. at 1047. The weight given a particular factor or element will vary. The more egregious the facts with respect to a particular element, the less important it is that another negative factor be present. In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor.

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[39] Parts I and II both embody multi-product fencing in, although AHP has not chosen to challenge Part I as overly broad. Part III, although narrowly restricted as to products covered, is based both on the need to "fence in" AHP so that it does not devise new deceptions, and on the need to overcome consumer misimpressions created by past deceptive advertisements. Part II(D) fences AHP in both as to products and as to types of deceptions.

[40] Many decisions have upheld multi-product—in some cases all-product—orders that were issued on the basis of findings than an advertiser had violated the statute with respect to a handful of products. For example, *Porter & Dietsch, supra,* 605 F.2d at 305, footnote omitted, upheld an order covering any food, drug, cosmetic, or device, although only one product was misrepresented:

> The record shows that Porter & Dietsch is continuously testing and marketing new prodcuts and, as a wholesale operation not faced with the expense of modifying manufacturing facilities to add new products to its line, it can do so comparatively cheaply. Fraser and wholly-owned subsidiaries of Porter & Dietsch have violated the Federal Trade Commission Act in the past. These facts and the evidence of petitioners' readiness, in carrying out the advertising campaign for X-11, to go at least to the very limits of what the law might be argued, with some modicum of plausibility, to allow, justified the breadth of the order against the principal offenders.

In *ITT Continental Baking Co. v. FTC,* 532 F.2d. 207, 222-23 (2d Cir. 1976), the Court refused to modify an order directed to *any* food product, although an advertising violation had been found with respect to only one. Another decision upholding a multi-product order is *Jay Norris, supra,* 598 F.2d at 1250-51.

There have also been a few appellate court decisions narrowing multi-product orders, e.g., *Standard Oil, supra.* The possible relevance of these decisions will be more apparent after the precise basis of Parts II(A)-(C) of the order has been explained.

Sears, Roebuck, supra, 676 F.2d at 392, citations and footnote omitted.[41] Thus, the validity of a multi-product order depends to a large degree on the facts of the particular proceeding. Because a multi-product order requires a prediction of the likely future conduct of a proven violator, and such a prediction is even more dependent on pragmatic inference and accumulated expertise than are most factual determinations, it may be especially appropriate to defer to the Commission's appraisal of the need for multi-product coverage.

In addition to the three *Sears, Roebuck* criteria, the court may also factor in the seriousness of the potential violations which the fencing-in provisions prohibit. The Commission should be allowed to consider that the consequences of a failure to construct a sturdy "fence" would be severe. This element is of course similar to the first *Sears, Roebuck* component in looking to "seriousness," but it differs in focusing on the seriousness of the actions to be proscribed rather than on the violator's past conduct. There must always be a reasonable relation, however, between the violation and the order; the Commission cannot proscribe conduct which bears no relation to the proven violation merely because such conduct would, if engaged in, have extremely untoward results. When drug advertising is at issue, the potential health hazards may well justify a more sweeping order than would be proper were the Commission dealing with a less consequential area.

C. Parts II(A)-(C) of the Order

[10] Parts II(A)-(C) of the Order withstand AHP's challenges. Each of the fac**[707]**tors set forth in *Sears, Roebuck* is present here to a significant extent. And since the Commission is attempting to curb misleading drug advertising by a proven violator, it should have especially wide latitude.

It should be emphasized that the findings underlying Part II of the Order are based on settled principles and are unchallenged by AHP at this stage of the proceedings. Although AHP attempts to extenuate its violations by arguing that "the standards by which its advertisements were judged in this case did not exist at the time the advertisements were disseminated," Petitioner's Reply Br. 14, this contention would be valid, if at all, only in the context of Part I(B) of the Order. The arguable novelty of the "substantial question" doctrine underpinning Part I(B) cannot support an inference, with respect to Part II, that AHP lacked "a ready willingness to flout the law," *see Sears, Roebuck, supra,* 676 F.2d at 392.

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[41] *Sears, Roebuck* also explained that the "prevention of 'transfer' of unfair trade practices is a fundamental goal of the Commission's remedial work." *Id.* at 394. If the Commission's authority to prevent "transfers" is denied,

> unscrupulous merchandisers (and we do not imply that Sears falls in that category) might be encouraged to transfer unlawful but successful advertising techniques from product to product, leaving the Commission the job of instituting separate proceedings to secure new orders for each unlawfully advertised product. Because so drastic a limitation on the Commission's enforcement procedure would conflict with . . . [Congressional intent] . . . would consume enormous resources, and would afford no particular protection to lawful advertisements and little protection to consumers, the Commission need not wait until a "transfer" occurs before issuing multi-product order in cases like the one before us. It may issue and enforce such orders to avert an "apprehended effect."

Id. at 395, footnote omitted. The same considerations apply when, as in our case, the Commission chooses a "deception" rationale instead of basing its decision on "unfairness."

The first *Sears, Roebuck* element is the "deliberateness and seriousness" of the violation. The ALJ found that Anacin's advertising campaigns were attempts to convince the public that Anacin differed from its competitors, even when no significant differences existed. The advertisements evince massive, long-standing efforts to persuade the public that Anacin had a special ingredient, that it did not have aspirin, that it had more "pain reliever" than competitor's products, that tests demonstrated Anacin's superiority, that doctors in surveys preferred Anacin, and that Anacin relieved tension. Furthermore, the concealment of Anacin's aspirin content created a health danger for some consumers. Similarly, by misrepresenting the tension-relieving qualities of Anacin, AHP encouraged unnecessary ingestion of a potentially hazardous product. The statement that it was established that Anacin provides more pain relief than "ordinary" aspirin also may have encouraged unnecessary aspirin consumption. The seriousness of the violations is enhanced by the inability of consumers to evaluate the product for themselves and to make purchasing decisions on the basis of personal experience. "Deliberateness" and "seriousness" appear to be present to a fairly large degree.

The violator's past record—the second *Sears, Roebuck* factor—also supports the Commission's decision. The Commission had previously entered three litgated cease and desist orders against AHP for misleading nonprescription drug advertisements: *Wyeth Chemical Co.*, 29 F.T.C. 281 (1939); *American Home Products Corp.*, 63 F.T.C. 933 (1963); and *American Home Products Corp.*, 70 F.T.C. 1524 (1966), *aff'd in part, modified in part, American Home Products Corp. v. FTC,* 402 F.2d 232 (6th Cir. 1968).[42]

Explaining Part I of the Order, the Commission indicated that there was "simply no room left to doubt that respondent is a habitual violator of the Federal Trade Commission Act, *American Home Products Corp. v. FTC, supra,* 402 F.2d at 237, and that in order to protect the public adequately against future deception of the same sort, these provisions of our Order must cover claims for more than the two products misrepresented." App. 407.

We need not decide whether, in the absence of other considerations, AHP's violations could be considered sufficiently "habitual" to warrant a multi-product order. We merely recognize that there have been previous violations which the Commission was entitled to place in the balance along with the other factors. Moreover, where, as in this case, the "present" violations have been extensively disseminated over a long **[708]** period,[43] the relative lack of "past record" should be weighed less heavily.

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[42] There have also been two court decisions, involving advertising claims other than the ones involved in the case at bar, finding that AHP had made false and misleading representations: *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978) (upholding district court injunction against certain false claims of Anacin's superiority over Tylenol); and *McNeilab, Inc. v. American Home Products Corp.*, 501 F.Supp. 517 (S.D.N.Y. 1980) (finding false the representations that Maximum Strength Anacin is stronger than Extra Strength Tylenol and has the maximum strength allowed without a prescription.) These two cases did not involve the Federal Trade Commission Act, however.

The "adaptability or transferability" of the violations to other products is the next item to consider. Explaining the scope of Part II(A) of the Order, the Commission remarked on AHP's demonstrated propensity to mislead and the ease with which its deceptive practices could be transferred to other products:

> We believe it essential that Part II.A encompass all OTC drug advertising by AHP, and bar misrepresentations of the specialness of common ingredients other than aspirin. The effort to misrepresent the nature of a quite ordinary ingredient—whether it is aspirin, caffeine, or some other substance*—is a technique that could easily be applied to advertising of OTC drug products other than Anacin or APF. And as we have described above in detail, this respondent's history of misleading advertising raises a serious concern that the order imposed here be carefully drawn if it is to succeed in preventing future violations.**
>
> ---
>
> *Caffeine, like aspirin, is a common substance available in many products (F. 387; Ans of AHP, ¶ 23). Thus, if caffeine is commonly used in products intended for the same purpose as the advertised product (as aspirin is used in many products intended for pain relief other than Anacin), the advertisement may not state or imply that it is an unusual or special ingredient. The fact that the ALJ found that caffeine has not been shown to pose a serious public health problem is irrelevant, since the basis for this disclosure requirement is the need to prevent misleading representations about the ingredient.
>
> **Because the advertising agency does not bring to this litigation the same history of advertising violations as AHP, we believe that an order covering only OTC internal analgesics will suffice as to Clyne. Nor does the order require Clyne to make affirmative ingredient disclosure.

App. 411. The decision to impose a narrower order on Clyne than on AHP is a further indication that the Commission's multi-product prohibitions were carefuly tailored to the facts of AHP's behavior. Although it does not appear that the Commission explicitly appealed, in defense of Part II(B) of the order, to the transferability of false representations that a product has more of an active ingredient, it seems clear enough that such a deceptive practice is as transferable as the practices proscribed by Part II(A). In addition, misrepresenting that doctors prefer a product, or that tests prove the product's superiority, is a form of deception that could readily be employed for any non-prescription drug product. Thus transferability is a significant factor in favor of allowing Part II(C) to encompass a broad range of products.

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[43] "The advertising challenged in this proceeding was widely disseminated, in print and broadcast media, over a period of many years and at a cost of millions of dollars annually." App. 406. AHP "spent approximately $210 million between 1960 and 1970, advertising Anacin to consumers as a product superior to aspirin in relieving pain and as a tension reliever," App. 245. *See also* App. 100.

All the *Sears, Roebuck* elements, and the additional consideration that the public's health could be endangered by the conduct that is proscribed, lead us to conclude that the Commission did not abuse its discretion by reining in AHP with Parts II(A)-(C) of the Order.

In attacking Parts II(A)-(C) of the Order, AHP cites *Standard Oil, supra.* But the multi-product order struck down in *Standard Oil* was, especially under the facts of that case, truly extraordinary; the order against AHP in the present case is considerably milder, and the circumstances here indicate a much more pressing need for some multi-product coverage. In *Standard Oil,* on the strength of just three implicitly misleading advertisements for a single product, a manufacturer and its advertising agency were subjected to an order covering *thousands* of products, including "fuel and lubricant products, waxes, fertilizers, pesticides, garden equipment, and cook books." 577 F.2d at 661. The manufacturer had never before been accused of false advertising and its agency had had only one consent order entered against it by the Commission. *Id.* at 663. The deception could not easily be transferred to other products, there was no "blatant and utter disregard of the law," **[709]** and the violators made "a good faith attempt to eliminate rapidly the implied misstatements . . ." *Id.* at 662-63. In the case at hand, only 35 products by AHPs count—all of them non-prescription drugs—are covered. The deceptions were extensive, involving numerous advertisements over many years. Even though it would be inaccurate to characterize AHP's behavior as a "blatant and utter disregard of the law," the violations were serious. Moreover, AHP made no "good faith attempt to eliminate rapidly the misstatements."

AHP rests its argument primarily on the Sixth Circuit's reasoning in *American Home Products Corp. v. FTC,* 402 F.2d 232, 237 (6th Cir 1968) (The *Preparation H* case). *Preparation H* appears to stand for the proposition that, unless it has been established that the petitioner is a habitual violator of the Federal Trade Commission Act, no muli-product order can be sustained when violations are found with respect only to one drug. As the Ninth Circuit recently declared, however, since the *Preparation H* proceeding "courts have regularly refused to follow such reasoning", *Sears, Roebuck, supra,* 676 F.2d at 392. It is also arguable that *Preparation H* was at variance with the Supreme Court's decision in *Colgate-Palmolive, supra,* which made the propriety of a multi-product order depend "upon the specific circumstances of the case", 380 U.S. at 394, 85 S.Ct. at 1047. The Supreme Court in *Colgate-Palmolive* mentioned transferability of the unfair practice as a factor, implying that "the habitual violator" issue is not dispositive. Even if we were to follow *Preparation H,* we would not necessarily disagree with the Commission's determination that even under that decision AHP can be considered a habitual violator and therefore can be subjected to a multi-product order.[44]

Attempts by AHP to distinguish *Litton, supra,* and *Sears, Roebuck, supra,* are unavailing. The order upheld in *Litton* banned misuse of survey results with respect to *all* of the manufacturer's consumer products, although the only proven violations involved microwave oven advertisements. It is true that one factor noted by the court was that the multi-product prohibition would not be very burdensome because Litton produced "few" consumer goods. 676 F.2d at 371. But in a very important aspect the order here is more modest than that upheld in *Litton,* for it applies not to all consumer products but only to non-prescription drugs sold to consumers. Had the Commission in its order against Litton adopted an approach comparable to that employed here, it might have restricted its order to home appliances or major home appliances. The Court characterized the *Litton* order as "narrow," but only in the sense that Parts II(A)-(C), although not Part II(D), in this case are also narrow: although encompassing a group of products, the provisions refer only to violations of the precise sort actually found. *See id.* at 371-72.

In *Sears, Roebuck,* an order applicable to all major home appliances of the advertiser was sustained where one such product, a dishwasher, had been misrepresented. The fourteen covered items constituted "a small proportion of the total number of products sold by Sears," 676 F.2d at 395. But *Sears, Roebuck,* as explained above, looked "to the circumstances as whole," *id.* at 392, in evaluating the multi-product order, and there is no suggestion that the court considered the proportion of the manufacturer's products covered to be of great significance. Indeed, it observed that the Supreme Court in *Col***[710]***gate-Palmolive* had upheld an *all*-products order; and it approved the Second Circuit decision, *Jay Norris, supra,* sustaining an all-products order. *Id.* at 385.[45]

D. Part II(D) of the Order

[11] Contrasted to the detail that characterizes much of the Commission's opinion, the reasoning in support of Part II(D) is quite abbreviated:

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[44] In *Grove Laboratories v. FTC,* 418 F.2d 489, 497 (5th Cir. 1969), the Court eliminated a multi-product provision like the one struck down by *Preparation H,* on the grounds that *Grove Laboratories* and *Preparation H* were "companion cases involving substantially the same facts and involving two competing companies who produce and sell almost identical products that are designed and used for the same purpose." . . . "AHP has not contended that *Grove Laboratories* supports its position on Part II of the order. Nor does it attempt to rely on *National Dairy Products Corp. v. FTC,* 412 F.2d 605, 624 (7th Cir. 1969), which restricted a Commission multi-product order where, unless restricted, the order (in the words of *ITT Continental Baking, supra,* 532 F.2d at 223 n. 24) "could reach conduct which had been specifically exonerated in the same FTC proceeding."

[45] *Sears, Roebuck* did not, as AHP alleges, hold "that the scope of a remedial order should be narrowest in a case . . . where the claims at issue are comparative and implied, rather than absolute and express," Petitioner Reply Br. 14, citing 676 F.2d at 393. What the *Sears, Roebuck* court said was that the implicit relative performance claims involved in *Fedders Corp., supra,* were less serious than the offenses involved in the matter before them. AHP's violations, which had the potential for severely injuring the health of consumers, were surely at least as serious as Sears, Roebuck's false statements about the ability of its dishwashing machine to clean dishes.

> Part II.D of the order requires respondent to have a reasonable basis, consisting of competent and reliable scientific evidence, for any . . . non-comparative representations concerning the effectiveness or freedom from side effects of its OTC drug products. In light of the overall history of advertising violations by AHP, described above, we believe this provision is necessary as a fencing-in measure to prevent respondent from making other unsubstantiated non-comparative claims.

App. 413. A footnote to this passage simply refers to the Commission's discussion of AHP's comparative claims. The Commission apparently meant to justify Part II(D) on the grounds that the deceptive comparative claims of effectiveness and safety for Anacin and APF, and the one deceptive non-comparative claim of effectiveness for Anacin (i.e., the claim that Anacin relieves tension) support a fencing in provision directed to all non-comparative claims of effectiveness or safety for all of AHP's non-prescription drugs.[46] This is a broader and vaguer provision than Parts II(A)-(C), and is premised on a more slender basis. In addition to covering many products as to which no deceptions were found, it encompasses deceptive practices which seem to be quite dissimilar to the deceptions actually found. While a provision such as Part II(D) might in other instances be sustained, Part II(D)'s lack of clarity, in our judgment, is too great under the circumstances of this case to survive review.

Part II(D) requires that AHP possess, with respect to any non-prescription drug product, "a reasonable basis" for any non-comparative representation of effectiveness or freedom from side effects. The "reasonable basis" test, as interpreted by the Commission, is flexible: "The appropriate measure for . . . support is, of course, to be determined in light of the particular claims made and the products for which they are made," App. 390 n. **. While the Commission at one point has apparently suggested that *any* drug performance claim must be supported by two well-controlled clinical studies (*id.* 390 n. **), the Commission acknowledged in the same opinion "the possibility that comparative claims for [non-prescription drugs other than analgesics] may be adequately substantiated, at least in some instances, by evidence other than two clinical tests . . ." (*id.* 407). Because the Commission has chosen not to bind itself in advance to rules as to the interpretation of the phrase "reasonable basis," any order which essentially relies upon reasonable basis language will be imprecise, although not necessarily fatally so.

The vice of vagueness is exacerbated by the breadth of an order. An unclear order whose prohibitions begin to approach in scope the statutory proscriptions creates the risk that primary interpretation and enforcement of the statute will be shifted from the Commission to the district court. *See Standard Oil, supra,* 577 F.2d at 661; *cf. American Home Products, supra,* 402 F.2d at 237. Although it goes too far to say [711] that Part II(D) simply "admonish[es] petitioner not to violate the law again," Petitioner's Br. 48, it is also inaccurate to declare that the provision "proscribes a specific subset of deceptive advertising, like and related to the deception that occurred here," Respondent's Br. 42. While Part II(D) does not track the statutory language and sweeps less broadly than the statute, it is nevertheless far-reaching enough to demand that we scrutinize it closely before concluding that the circumstances required such imprecision.

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[46] The Commission's brief in this Court seems to assume, however, that Part II(D) is predicated only on the nervous tension claim. Respondent's Br. 42-3. This was the ALJ's position. App. 317.

While AHP presumably can "oblige the Commission to give [it] definitive advide as to whether [its] proposed action, if pursued, would constitute compliance with the order," *Colgate-Palmolive,* 380 U.S. at 394, 85 S.Ct. at 1047, *Jay Norris,* 598 F.2d at 1251, and this possibility is a factor weighing in favor of permitting a certain amount of imprecision, we do not believe that it cures the excessive vagueness here.

If AHP had committed several different violations of the type proscribed by Part II(D), the breadth and vagueness of this provision would be less troublesome. But the only advertising claim made by AHP that is in the category proscribed by Part II(D) is the claim that Anacin relieves tension. This was a non-comparative representation of effectiveness. There were no non-comparative misrepresentations of freedom from side effects.

Although AHP has demonstrated a propensity to represent improperly the superiority in various respects of Anacin and APF over the products of its competitors, the Commission has said little to support a contention that AHP has an inclination to misrepresent non-comparative effectiveness, and nothing to support a charge that AHP has a tendency to misrepresent the non-comparative freedom from side effects of any product. As noted, *supra,* n. 5, the heart of this case is AHP's attempt to *differentiate* its products from those of competitors. Any attempts by AHP to misrepresent, in *absolute* terms, some qualities of its products, seem to have been somewhat more peripheral to its advertising strategy, even if such attempts led to serious violations.

The Commission has not recommended any improvements that might be ordered in the event Part II(D) is found to be unsupportably vague. Though it is undisputed that false non-comparative claims of efficacy have more serious consequences than comparative ones (Petitioner's Reply Br. 3 n. 9), the Commission has not argued that a false claim of ability to relieve tension is readily transferable to any non-prescription drug.

In sum, the following factors persuade us that Part II(D) should be vacated in its entirety: the only violaton of the sort interdicted by Part II(D) that AHP actually committed is specifically covered by the uncontested Part IV; there is no indication that this violation is easily transferable; the record is ambiguous as to the likelihood that AHP will in the future disseminate false non-comparative claims; the provision is quite imprecise; Part II(D) would be equally imprecise, and still quite broad, even if limited to non-comparative effectiveness claims; the Commission has not explained why the circumstances require such imprecision.[47]

IV. Part III of the Order: The Aspirin Disclosure Provision

[12] Part III of the Order imposes the requirement of disclosing the presence of aspirin whenever any performance claim is made in Anacin or APF advertisements. AHP is concerned that this is a "burdensome prior restraint." It insists that Part II(A) of the Order—which is unchallenged in its application to Anacin and APF—ensures that deception as to the ingredients of Anacin and APF will end. Part II(A) terminates AHP's claims of special ingredients. AHP's argument therefore is that since it will no longer be able to claim that [712] Anacin and APF have special or unique ingredients, there is no longer any deception, and for the Commission to impose further requirements is a violation of First Amendment free speech rights.

The Commission appears to have justified the disclosure requirement on two grounds. First, as AHP no longer disputes, past advertisements misled the public as to the contents of Anacin and APF. Without disclosure, the public's misimpressions would tend to persist. Second, unless a disclosure requirement is imposed, AHP, with its "striking history . . . of related advertising violations . . . will devise ways to continue misrepresenting the nature of its product."

AHP's attempts to conceal the presence of aspirin in Anacin and APF were aptly summarized as follows:

> On the basis of the small actual differences in formulation between the Anacin (and APF) compounds and plain aspirin, respondents advertisements have created an impression that the products are based on some special, unusually strong pain reliever entirely different from and superior to aspirin. Whenever aspirin is named in the Anacin ads, it is used in such a way to contrast it with Anacin and associate it with Anacin's competitors. None of the challenged Anacin advertisements discloses that the analgesic ingredient in Anacin itself is, in fact, aspirin; instead, the identity of Anacin's ingredient is in every single instance obscured with phrases like "the pain reliever doctors recommend most" and "this specific fast acting ingredient against pain."

App. 364. The point is not that a failure to disclose aspirin in advertisements for aspirin-based products is necessarily misleading, but that it was misleading at least in the context of AHP's attempts to distinguish Anacin's ingredient as special or unique.[48]

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[47] It is at least arguable that the decision to excise Part II(D) is inconsistent with *Porter & Dietsch*, *supra*, 605 F.2d at 305-6.

[48] As remarked *supra*, there is evidence that many consumers are unaware that Anacin contains aspirin. Even one of AHP's expert witnesses "admitted that his own study as aspirin idiosyncracy revealed that patients took OTC analgesic drugs, such as Anacin, without knowing that the products contained aspirin. . . ." App. 205. There is no reason to assume that warnings from physicians to their patients eliminate all the dangers of deceptively representing that an over the counter product does not contain aspirin.

The Commission's judgment that Part III is needed in addition to Part II(A) is acceptable under the "reasonable relation" test of *Jacob Siegal, supra* and the "fencing in" precedents. The cases are uniform that the Commission's evaluations of the likelihood that a proven violator will devise new deceptions deserve much deference. What is more, Part II(A) seems insufficient to overcome the effects of past misrepresentations that Anacin does not have aspirin. We cannot hold that the Commission is authorized to require aspirin disclosure only in the same contexts that failure to disclose was specifically found misleading.

AHP seems to recognize that the "fencing in" doctrine provides powerful support for the Commission's Order. It appears instead, that AHP is arguing that the fencing in doctrine is unconstitutional in its application here.[49] AHP alleges that Part III is an unconstitutional and "burdensome prior restraint." It is difficult to locate the burden, however; and even if there would be a significant burden, Part III would be vindicated by the very free speech cases on which AHP relies.

The disclosure requirement is not burdensome except insofar as it may inhibit illicit attempts to derive a market advantage from promoting misimpressions about Anacin and APF. It would consume far less space—and presumably less of AHP's advertising budget—to admit that the products have aspirin than to indulge in circumlocutions designed to conceal this fact. To take just one example, according to an AHP advertisement, "Anacin starts with as much pain reliever as the leading aspirin tablet. Then adds an extra core of this specific fast-acting ingredient against **[713]** pain." App. 364. Compliance with Part III could easily be accomplished by substituting "aspirin" for "pain reliever," or perhaps by replacing "this specific fast-acting ingredient against pain" with the word "aspirin." Modifications of this sort would save space, comply with Part III, and yet convey essentially the same information as the original version. The Commission has represented that if situations arise in which the disclosure of aspirin in advertisements covered by Part III would pre-empt space, it will "entertain a request" for a modification. Appellee's Br. 33 n. 23.

Exempted from Part III are advertisements that incorporate no performance claims—for example, those that merely inform the public where and at what price the products are available, or perhaps those that avoid product information in favor of merely creating a "mood" associated with the products. Thus, Part III is not a true "corrective advertising" provision in that its disclosure requirements are only triggered when AHP makes certain types of claims. Thus some advertisements, especially the more abbreviated ones, would avoid Part III's strictures. Part III merely requires that if AHP takes the space to make performance claims, it must also state that the product for which the claims are made contains aspirin.

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[49] Indeed, AHP's position comes close to the proposition, directly contradicted by the statute and the cases, that only an affirmative misrepresentation, not a failure to disclose a material fact, can constitutionally be barred as deceptive.

AHP misconceives the commercial free speech cases. These cases would not aid AHP's cause even if AHP were correct that Part III of the Order is burdensome. AHP relies heavily on *Beneficial, supra,* a decision which if anything lends weight to the Commission's position. In *Beneficial,* the Commission had forbidden an advertiser from using the slogan "Instant Tax Refund." The so-called "Instant Tax Refund" was in fact an ordinary loan, and the phrase tended to mislead consumers into supposing that a special service, keyed to the individual's anticipated tax refund, was offered. This Court nevertheless set aside the Commission's prohibition, because of the failure "to consider fully the possibility of requiring merely that advertising copy by rewritten in lieu of total excision of the offending language." 542 F.2d at 619. Qualifying explanatory language is in general a preferable remedy. *Id.* at 618-620.[50] In the present case, the Commission has acted precisely as *Beneficial* directed. It determined that, while the advertisements were misleading, there was no necessity to ban particular words or phrases. Rather, AHP is permitted to employ any language it chooses, provided that a qualifying explanation is included. It may, for example, continue to refer to "this specific fast-acting ingredient against pain," but it must also convey that this ingredient is aspirin.

Recent extension of First Amendment protection to commercial speech is founded on the philosophy that commercial speech warrants "the degree of protection . . . nec**[714]**essary to insure that a flow of truthful and legitimate commercial information is unimpaired," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 772 n. 24, 96 S.Ct. 1817, 1831 n. 24, 48 L.Ed.2d, 346 (1976). The Supreme Court did not "prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 772, 96 S.Ct. at 1831. When health is involved, the interest in assuring a "clean" flow of information is enhanced. *National Commission on Egg Nutrition, supra,* 570 F.2d at 162. The rationale of the commercial speech cases, "to open the channels of communication," *Virginia State Board of Pharmacy,* 425 U.S. at 770, 96 S.Ct. at 1829, can have no application here. Indeed, it would be a subversion of commercial speech doctrine to hold that AHP's interest in preventing the nature of its products from being unveiled in its advertisements invalidates the Commission's disclosure order.

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[50] *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which extended First Amendment protection to lawyer advertising, adopted a similar approach and, in the words of *In re R.M.J.,* 455 U.S. 191, __, 102 S.Ct. 929, 938, 71 L.Ed.2d 64 (U.S. 1982), "suggested that the remedy [for potentially misleading advertising] in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 772 n. 24, 96 S.Ct. 1817, 1831 n. 24, 48 L.Ed.2d 346 (1976), notes that the special attributes of commercial speech may "make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Cf. National Society of Professional Engineers v. United States;* 435 U.S. 679, 697, 98 S.Ct. 1355, 1368, 55 L.Ed.2d 637 (1978) (upholding a district court order, far more burdensome on speech than the Order in the present case, which was designed "to avoid a recurrence of the violation and to eliminate its consequences."); *United States v. Reader's Digest Association,* 662 F.2d 955, 965 (3d Cir. 1981) *cert. denied,* 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (U.S. 1982). ("Any remedy formulated by the FTC that is *reasonably necessary* to the prevention of future violations does not impinge upon constitutionally protected commercial speech"); and *National Commission on Egg Nutrition, supra,* 570 F.2d at 164, in which the court held that, consistently with the First Amendment, the Commission could require an advertiser to reveal the existence of a controversy among the experts, but, in the absence of a long history of deception, could not require that advertisements present the other side of the controversy.

V. Conclusion

For the reasons set out above, the Order of the Commission will be modified by the delection of Part II(D), and, as modified, enforced. There is no contention that the Commission abused its discretion by refusing, in its denial of AHP's petition for rehearing, to stay its Order until proceedings against AHP's competitors, Sterling Drug and Bristol-Myers, have been completed.[51] The Commission, however, has indicated that it will consider such a stay after we have issued our decision, and it would not seem unreasonable that in the interests of fairness a stay be granted at least with respect to Part I(B).

Appendix: The Commission's Order

I

IT IS ORDERED that respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that a claim concerning the superior effectiveness or superior freedom from side effects of such product has been established or proven unless such representation has been established by two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the comparative effectiveness or comparative freedom from side effects of the drugs involved, on the basis of which it could fairly and responsibly be concluded by such experts (1) that the drug will have the comparative effectiveness or freedom from side effects that it is represented to have, and (2) that such comparative effectiveness or freedom from side effects is demonstrated by methods of statistical analysis, and with levels of confidence, that are generally recognized by such experts. The investigations shall be conducted in accordance with the procedures set forth below:

At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be conducted on any disease or condition referred to, directly or by implication; or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is **[715]** effective. The clinical investigations shall be conducted as follows:

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[51] *See e.g., Porter & Dietsch. supra,* 605 F.2d at 307 ("The fact that other firms in the market are not similarly burdened does not affect the validity of this order."). *Cf. Developments in the Law-Deceptive Advertising,* 80 HARV.L.REV. 1005, 1083 (1967) (Commission occasionally "stay[s] a proceeding or suspend[s] the effect of an order pending investigation and action against competitors.") We do not suggest that the Commission should ignore the interests of scrupulous competitors who forego misleading claims. *See FTC v. R.F. Keppel & Bro.,* 291 U.S. 304, 51 S.Ct. 423, 78 L.Ed. 814 (1934).

1. The subjects must be selected by a method that:
   a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any);
   b. Assigns the subjects to the test groups in such a way as to minimize bias; and
   c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity or duration of disease or condition (if any), and use of drugs other than the test drugs.
2. The investigations must be conducted double-blind, and methods of double-blinding must be documented. In addition, the investigations shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.
3. The plan or protocol for the investigations and the report of the results shall include the following:
   a. A clear statement of the objective of the investigation;
   b. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response and steps taken to minimize bias on the part of subject and observer;
   c. A comparison of the results of treatments or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data;
   d. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

B. Making any representation, directly or by implication, of superior effectiveness or freedom from side effects of such product unless:

1. The superior effectiveness or superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or*
2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the comparative efficacy or side effects claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

II

IT IS FURTHER ORDERED that respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription drug product, in or affecting commerce, as "commerce" and "drug" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when such ingredient is commonly used in other non-prescription drug products intended for the same use or uses as the product advertised by respondent. [716]

B. Making any false representation that such product has more of an active ingredient than any class of competing products.

C. Misrepresenting in any manner any test, study or survey or any of the results thereof, concerning the comparative effectiveness or freedom from side effects of such product.

D. Making any noncomparative representation, directly or by implication, concerning the effectiveness or freedom from side effects of such product unless, at the time such representation is made, respondent has a reasonable basis for such representation which shall consist of competent and reliable scientific evidence.

III

IT IS FURTHER ORDERED that the respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any product in which "Anacin" or "Arthritis Pain Formula" is used in the name, or in affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and conspicuously that the analgesic ingredient in such product is aspirin, when such is the case and when the advertisement makes any performance claim for the product.

IV

IT IS FURTHER ORDERED that respondent American Home Products Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, that Anacin relieves nervousness, tension, anxiety or depression or will enable persons to cope with the ordinary stresses of everyday life.

[Parts V-VII omitted. See fn. 1, herein.]

THE MUTUAL ASSURANCE SOCIETY OF ALABAMA
v.
FEDERAL TRADE COMMISSION*

Civ. A. No. CV82-PT-1300-S FTC File No. 811-0157

The United States District Court, Northern District of Alabama
December 3, 1982

In an action for declaratory judgment, plaintiff—a non-profit organization whose sole purpose is to provide its physician members with medical malpractice and premises liability insurance—held that it was outside FTC jurisdiction because it is not engaged in commerce but in the "business of insurance," exempt from FTC investigation under the McCarran-Ferguson Act. Court, however, ruled that FTC's inquiry did not focus on the "business of insurance," but rather on the organization's activities allegedly aimed at restraining competition from nurse practioners and other nonphysician health care providers; and granted Commission's counterclaims for enforcement of subpoenas seeking information to determine whether the Society had violated Section 5 of the FTCA. Court further ruled that plaintiff had failed to show a patent lack of FTC jurisdiction and had conceded that information was reasonably related to agency's investigation and that compliance would not be unduly burdensome.

Before PROPST, *District Judge.*

MEMORANDUM OPINION

This matter is before this court on plaintiff The Mutual Assurance Society of Alabama's action seeking a declaratory judgment and defendant The Federal Trade Commission's Counterclaim Petitioning To Enforce Subpoena Duces Tecum served on plaintiff The Mutual Assurance Society of Alabama. This court heard oral argument in chambers on October 5, 1982 at 4:30 p.m. and took the matter under submission at that time. Both parties have submitted briefs on this matter and acknowledge that the issues presented therein are ripe for determination. The same legal questions are presented by the complaint and the counterclaim and both will be resolved in this opinion of the court.

The controlling facts are not in dispute for purposes of the declaratory judgment and subpoena enforcement actions. The Mutual Assurance Society of Alabama (Mutual Assurance) is a domestic mutual insurer organized and existing under the law of the State of Alabama. *Code of Alabama* § 27-27-1 *et seq.* Mutual Assurance's sole purpose is to provide certain forms of medical malpractice and premises liability coverage to its members and policyholders, all of whom are physicians licensed to practice in the State of Alabama. Mutual Assurance issues casualty insurance policies and its activities are regulated by the Alabama Insurance Code, Title 27 of the Code of Alabama (1975). The Alabama Insurance Code regulates the availability of medical liability insurance for the medical profession, medical institutions, and other health care providers. *See* § 27-26-4.

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*Not otherwise reported.

The Federal Trade Commission (FTC) is an independent administrative agency authorized and directed to investigate and prevent violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (FTC Act), which prohibits "unfair methods of competition in or affecting commerce." In 1981, the FTC became aware of facts which led it to investigate Mutual Assurance and the Medical Association of the State of Alabama (Medical Association) for possible violations of Section 5. The Medical Association, a voluntary association, is comprised of about ninety percent of the practicing physicians in Alabama. The Medical Association sponsored the organization of Mutual Association and some persons are board members of both organizations. Mutual Assurance is owned by the physicians it insures.

The FTC investigation, of itself, does not entail a determination that Mutual Assurance or the Medical Association has violated the law. Rather the FTC purports only to be gathering facts with which to determine whether further proceedings are necessary.

The FTC probe focuses on actions of Mutual Assurance and the Medical Association allegedly aimed at restricting the use of nurse practitioners and other nonphysician health care providers in Alabama, especially in rural health clinics. These nurse practitioners are specially trained to furnish basic health care (basic diagnoses and prescribing treatment in simple cases), the intended effect of which is to increase the availability of health care where there are too few doctors to provide adequate medical service. The Rural Health Clinic Services Act of 1977, 91 Stat. 1485 (1977) fosters development of rural health clinics staffed by nurse practitioners by making such clinics eligible for Medicare and Medicaid payments. The Act authorizes nurse practitioners to work without having a physician continuously present at the clinic, absent state law providing otherwise.

General rural health clinics were opened in Alabama in which nurse practitioners work without continuous on-site supervision by a physician. A "physician preceptor" establishes the procedures under which the nurse practitioners operate and is always available for consultation by telephone.

The State of Alabama has no statute or regulation which prohibits this arrangement in the rural health clinics. However, in January 1978 the State Board of Medical Examiners, which consists of the fifteen directors of the Medical Association, issued a set of guidelines stating that independent diagnosis and treatment by nonphysicians was illegal. In March 1978 the Attorney General of Alabama held that the Board of Medical Examiners' action was unauthorized because regulation of professional nursing was under the jurisdiction of the Board of Nursing, not the Board of Medical Examiners. In October 1978, the Board drafted a second set of guidelines, which provided that the supervising physician rather than the murse practitioner must see a patient initially, make the diagnosis, and prescribe treatment. In May 1979 the Alabama Attorney General again ruled that these guidelines were unauthorized and illegal. The FTC is currently investigating the Medical Association for its role in these and other such activities to determine if it violated Section 5 of the FTC Act.

Mutual Assurance's position in this investigation stems from the position it assumed regarding nurse practitioners. In February 1979, following the Attorney General's ruling invalidating the Board's actions, Mutual published an "advisory on its policy" in a Medical Association publication. The "advisory" stated that Mutual's malpractice insurance coverage would follow the policies of the Board of Medical Examiners (i.e., "it is only legal to use these people [nurse practitioners and other nonphysician health care providers] in cases where they have direct supervision.") In April 1979 Mutual Assurance's Board of Directors voted to reaffirm this position in applying Mutual's insurance coverage to physician preceptors.

The FTC points to newspaper accounts and other information which indicates that as a result of Mutual Assurance's advisory several rural health clinics closed temporarily because the physician preceptors who were insured by Mutual were concerned that Mutual Assurance's policy would not cover them for liability arising from the rural clinics. The newspaper accounts indicated that some clinics would reopen only after the preceptors could obtain other liability insurance coverage. Other policies were apparently significantly more expensive and increased the costs for the clinics. The FTC asserts that such practices of Mutual Assurance may be continuing.

Believing it had a duty to investigate these "restraining" activities of the Medical Association and Mutual Assurance, the FTC requested that Mutual Assurance voluntarily supply to the FTC information regarding the adoption and implementation of Mutual Assurance's guidelines and any involvement that Mutual Assurance may have had with the Medical Association in this matter. Mutual Assurance declined to provide anything except the minutes of its April 1979 meeting. In response, the FTC formally issued a subpoena *duces tecum* to Mutual in January 1982. Mutual responded with a motion to quash the subpoena arguing that it was outside the FTC's jurisdiction because it was not engaged in commerce and because its practices were exempt under the McCarran-Ferguson Act, 15 U.S.C. § 1011.

By letter of June 9, 1982, Mutual reiterated to the FTC its unwillingness to comply with the subpoena. Further, Mutual indicated that it had filed suit in this court seeking a declaration that the Commission had exceeded its authority and an injunction against enforcement of the subpoena.

Contentions of the Parties

The FTC argues on the basis of *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971), that it must be accorded "extreme breadth" in conducting investigations pertaining to the FTC Act and its various proscriptions. The FTC says that the standards applied in judicial enforcement proceedings is that so long as the information sought is "reasonably relevant" or not "plainly irrelevant" to an inquiry which the FTC is authorized to make, and compliance is not unduly burdensome, the compulsory process must be enforced. The FTC asserts that under this standard its arguments are compelling. Mutual Assurance concedes that the information requested in the subpoena is reasonably relevant to the Commission's inquiry and further that to comply with the subpoena would not be an undue burden on Mutual Assurance.

Then, on the basis of *FTC v. Gibson*, 460 F.2d 605, 608 (5th Cir. 1972), the FTC argues that Mutual Assurance "may not litigate the jurisdictional issue as a defense in a subpoena enforcement proceeding." This point follows the FTC's enunciation of Mutual Assurance's principal arguments: (1) that FTC jurisdiction is lacking because Mutual Assurance is not engaged in commerce; and (2) that Mutual Assurance is exempt from FTC scrutiny under the McCarran-Ferguson Act, 15 U.S.C. § 1011. The FTC's basic argument is that it should not be denied the very facts which may establish that it has jurisdiction. The exception to this rule is in a case where jurisdiction is "patently lacking;" the FTC maintains that this standard is inapposite here. The FTC contends that "[b]ecause the instant subpoena was issued to aid the Commission's investigation into whether violations of Section 5 have occurred, it is within the Commission's authority." The FTC cites Section 6 of the FTC Act as an additional source of authority for the subpoena power. In response to Mutual Assurance's claim for exemption, the FTC cites *American General Insurance Co. v. FTC*, 496 F.2d 197, 200 (5th Cir. 1974), for the Fifth Circuit view that "The McCarran-Ferguson Act is not without ambiguity, and we feel that the question of its applicability is better left to a review of any final order which may be entered [by the Commission] in this case." The FTC maintains that for these reasons Mutual's jurisdictional arguments are not grounds for declining to enforce the Commission's subpoena.

The FTC then argues that no showing has been made of a patent lack of jurisdiction; first in regard to the "affecting commerce" standard. Mutual Assurance argues that its business is intrastate in nature and thus does not satisfy a jurisdictional requirement of Sections 5 and 6 of the FTC Act. The FTC's argument is that this argument by Mutual Assurance is premature because it is based on facts as yet unavailable to the FTC.

At page eight of its brief, Mutual Assurance then argues that it is exempt from this investigation under the McCarran-Ferguson Act and says:

> The real issue here is simple. If the Commission's investigation of Mutual constitutes the investigation of the "business of insurance" exempt by virtue of the McCarran-Ferguson Act, then the Commission has exceeded its authority and its subpoena cannot be enforced. *FTC v. Winters National Bank & Trust Co.*, 601 F.2d 395 (6th Cir. 1979).

Mutual Assurance acknowledges that to qualify for the McCarran Act exemption from the antitrust laws, the activity must qualify as the business of insurance and be subject to regulation by state law. The McCarran Act does not define the business of insurance and thus Mutual looks to judicial interpretation of the legislative history and related Supreme Court decisions to support its position.

Mutual Assurance cites *Group Life and Health Insurance v. Royal Drug Co.*, 440 U.S. 205 (1979), for the definition of the business of insurance:

> First, the "business of insurance" involves the underwriting or spreading of risk. Second, it involves the contractual relationship between the insurer and the insured. Third, it may involve practices limited to entities within the insurance industries.

After discussing the reasons for the court's decision that the business of insurance was not involved in *Royal Drug* and that the McCarran Act exemption did not apply, Mutual Assurance argues the facts of the instant case in light of the *Royal Drug* criteria. Essentially, Mutual Assurance makes the following arguments: First, the guidelines imposed by Mutual Assurance "attempt to define the extent and scope of coverage provided to insureds under particular circumstances; in other words, which risks Mutual Assurance will underwrite and which it will not." Mutual Assurance asserts that regardless of the other ways to characterize the guidelines, the first criterion of *Royal Drug* is satisfied and this is the determinative issue.

Second, Mutual Assurance says only that "[t]he guideline was of concern to Mutual policyholders," and that "[t]herefore the second *Royal Drug* criterion is satisfied." No case is cited on this point.

Third, Mutual Assurance argues that if the true focus of the FTC investigation is on the "competition between nurse practitioners and physicians in providing health care services" then the FTC "has no business" conducting an investigation of Mutual and its guidelines. Mutual Assurance then adds that so long as it is the object of an FTC investigation, the fact remains that the FTC is without authority to probe the "business of insurance."

Mutual Assurance then adds that it is the "subject of extensive and comprehensive state regulations," citing *Code of Alabama* § 27-1-1 *et seq.* (1975).

The FTC then contends that Mutual's activities are not patently exempted by the McCarran-Ferguson Act as constituting the "business of insurance." Citing *Union Labor Life Insurance Co. v. Pirenc,* No. 81-389 (U.S. June 28, 1982) (slip opinion at 5-6), the FTC asserts:

> To be exempt from antitrust challenge under the McCarran Act, Mutual's guideline (and any other activities allegedly restraining trade) must be the "business of insurance," and must also be regulated by the State of Alabama. However, even if they were otherwise exempt, Mutual's activities could lose their exemption if they constituted a boycott or act or coercion or intimidation. Like other exemptions from the antitrust laws, the McCarran Act exemptions must be narrowly construed.

FTC brief at page 13.

The FTC then makes an important distinction to show that the exemption should not apply here. The point is that the exemption applies not to the business of insurance companies but instead to the business of insurance. Thus, the court is to consider the specific activity being investigated and not the type of business that is conducting the activity. *See e.g. Pireno,* Citing *Pireno.* rather than *Royal Drug,* the FTC acknowledges the three criteria stated by the Supreme Court for determining whether an activity constitutes the business of insurance. In *Pireno,* the court notes that "[n]one of these criteria is necessarily determinative in itself." The thrust of the FTC's argument is that they do not have sufficient facts to determine whether these criteria have been met and that enforcement of this subpoena will help the FTC advance to this conclusion.

The FTC then argues that the Section 3(b) exception to the McCarran Act exemption, which dictates that the McCarran Act does not shield "attempts to boycott, intimidate or coerce," applies and gives it the authority to investigate Mutual Assurance. FTC Reply Brief at page 12. This court need address the scope of the boycott provision only if it concludes that the relevant activities of Mutual Assurance clearly constitute the business of insurance. Thus, development of this issue would be forthcoming in the event of such a ruling.

The final argument presented by both sides concerns the 1980 amendment to Section 6 of the FTC Act, 15 U.S.C. § 46 (Supp. IV), which added that "Nothing in this section . . . shall apply to the business of insurance . . . ." Mutual Assurance argues that "Congress amended Section 6 to curb the Commission's own misconstruction of its authority to investigate the 'business of insurance.'" Mutual Assurance maintains that this amendment is evidence of a congressional concern that the FTC would venture into the business of insurance unless it was expressly harnessed from doing so.

On the other hand, the FTC argues at page 14 of its reply brief as follows:

> The legislative history clearly shows that the amendment of Section 6 was intended to preclude the Commission from having broader authority to investigate insurance companies for non-law enforcement purposes than it had for law enforcement purposes. The amendment was not intended to circumscribe the Commission's existing authority to proceed against insurance companies for conduct that is not protected by the McCarran Act, or to investigate to determine whether the exemption would be available. . . . Accordingly if the practices under investigation are not the "business of insurance," or if they come within the boycott exception to the McCarran Act, the Commission has jurisdiction to investigate Mutual in anticipation of a potential adjudicative proceeding under Section 5 of the FTC Act.

Neither party cites any cases to support its Section 6 argument, but see S.Rep. No. 96-500, 96th Cong. First Sess. 13 (1979); and House Conf. Rep. No. 96-917, 96th Cong., First Sess. 1143 (1979).

The FTC concludes with the following contention:

> In ruling on the Commission's counterclaim, however, this Court should not implicitly approve the procedure used by Mutual in bringing a preenforcement suit for declaratory and injunctive relief. Every one of the seven courts of appeals—including the Fifth Circuit—that has considered whether preenforcement injunctive and declaratory relief should be granted to recipients of the Commission's compulsory process has concluded that such recipients have an adequate remedy at law in statutory proceedings brought by the Commission to enforce its compulsory process. See *Wearly v. FTC.*, 616 F.2d 662, 665 (3d Cir.), *cert. denied,* 449 U.S. 822 (1980); *American Motors Corp. v. FTC,* 601 F.2d 1329, 1335-37 (6th Cir.), *cert. denied,* 444 U.S. 941 (1979); *Casey v. FTC,* 578 F.2d 793, 794 (9th Cir. 1978); *Atlantic Richfield Co. v. FTC,* 546 F.2d 646, 649-50 (5th Cir. 1977); *Blue Ribbon Quality Meats, Inc. v. FTC,* 560 F.2d 874 (8th Cir. 1977); *First Nat'l City Bank v. FTC,* 538 F.2d 937, 938-39 (2d Cir. 1976); *Beatrice Foods Co. v. FTC,* 1966 CCH Trade Cas. ¶ 71,733 (D.C. Cir. 1966).

FTC Reply brief at page 15.

CONCLUSIONS OF LAW

Mutual Assurance acknowledges that the information which is the subject of the FTC subpoena is reasonably relevant to the investigation it is conducting and further that to respond to the subpoena would not be unduly burdensome on Mutual Assurance. *See Genuine Parts Company, supra.* The issue before this court therefore is whether the FTC's jurisdiction over the activity it seeks to investigate is so patently lacking as to render the subpoena unenforceable. Mutual Assurance makes two arguments to support its contention that the FTC's jurisdiction is patently lacking.

Mutual Assurance first contends that FTC jurisdiction is patently lacking because Mutual is not engaged in interstate commerce. On the basis of *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 214 (1946), and *FTC v. Gibson,* 460 F.2d 605, 608 (5th Cir. 1972), this court concludes that the mere assertion that it is not engaged in interstate commerce is not a jurisdictional bar to the issuance of a FTC subpoena. In *Gibson,* the Fifth Circuit looked to the *Oklahoma Press* opinion for the definition of the "role of federal courts in reviewing the jurisdictional determinations of federal administrative agencies during preliminary agency investigations." The Fifth Circuit called the role a "narrowly restricted one."

In *Oklahoma Press,* the Supreme Court discussed the role of the district court as follows:

> We think, therefore, that the Courts of Appeals were correct in the view that Congress had authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence on that question, by seeking the production of petitioners relevant books, records, and papers.

327 U.S. at 214. In reference to this particular paragraph, the Fifth Circuit in *Gibson* said:

> The rationale of the *Oklahoma Press* rule is that it allows enforcement of subpoenas where the evidence necessary to establish the interstate nature of the commerce involved is in the possession of the suspected violator and can be secured only by such a subpoena. Under this rule, appellants may not litigate the jurisdictional issue as a defense in a subpoena enforcement porceeding.

460 F.2d at 608. This court notes that in *Gibson* there was evidence that Gibson Products Company did business in twenty-seven states, yet it claimed that the subpoena should not be enforced because their activities were not "in interstate commerce." The Fifth Circuit rejected this argument on the ground that to determine the jurisdictional issue prior to the issuance of a subpoena would be "premature at [that] stage of the proceedings. . . ." The Fifth Circuit does *not* qualify its conclusion in a way to suggest that had it not been so obvious that a finding of involvement in interstate commerce was likely that its conclusion would have been different. Thus, Mutual Assurance's claim that it is not engaged in interstate commerce is not properly a bar to the issuance of a subpoena requesting information which will assist in determining whether FTC jurisdiction exists or not. *See also FTC v. Shaffner,* 626 F.2d 32, 36-37 (7th Cir. 1980).

Mutual Assurance's principal argument is that it is exempt from FTC scrutiny because it is engaged in the business of insurance which under the McCarran-Ferguson Act is protected from the coverage of the FTC Act insofar as it is regulated by state law. See 15 U.S.C. § 1012(b). This court notes that *Pireno, supra,* and *Royal Drug, supra,* provide a definition for the "business of insurance" which is worthy of duplication here:

> First, the "business of insurance" involves the underwriting or spreading of risk. Second, it involves the contractual relationship between the insurer and the insured. Third, it may involve practices limited to entities within the insurance industries.

440 U.S. at 210-217; and *Pireno,* No. 81-389 at 9. To sharpen the focus of this analysis, the Fifth Circuit decision in *Perry v. Fidelity Union Life Insurance,* 606 F.2d 468 (5th Cir. 1979); *reh. denied,* 608 F.2d 1373 (5th Cir.); *cert. denied,* 446 U.S. 987, 100 S.Ct. 2973, 64 L.Ed.2d 845 (1979), is particularly noteworthy. The court stated:

> We do not think that the nature of premium financing changes, in chameleon-like fashion, simply because an insurance company rather than a loan or finance company authors the promissory note. Not all insurance company activities constitute the business of insurance, and the McCarran Act does not insulate every operation of every insurance company from federal regulation.

606 F.2d at 470. Thus, this court must look to the particular activity which is the subject of the FTC investigation and not to the broad nature of the business in which Mutual Assurance is engaged.[1]

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[1] Mutual Assurance cites *F.T.C. v. Winters National Bank and Trust Co.,* 601 F.2d 395 (6th Cir. 1979), as additional source material to support the proposition that "so long as Mutual remains a party to the investigation and its policies and

(footnote continued)

In the instance case, the FTC purports not to investigate the "business of insurance" but instead the relationship between an insurance company and another entity (Medical Association). The FTC purports to investigate the alleged restraining activities of Mutual and the Medical Association (i.e. the adoption and implementation of Mutual's guidelines and any involvement that Mutual may have had with the Medical Association in this matter). Is this the business of insurance?

In *Pireno, supra,* the Supreme Court named the *Royal Drug* decision as the controlling precedent which provides the mode of analysis in determining whether a particular activity or agreement constitutes the business of insurance. The *Pireno* Court described the facts in *Royal Drug* as follows:

> The principle petitioner in *Royal Drug* was a Texas insurance company, Blue Shield, that offered policies entitling insured persons to purchase prescription drugs for $2 each from any pharmacy participating in a "Pharmacy Agreement" with Blue Shield; policyholders were also allowed to purchase prescription drugs from a nonparticipating pharmacy, but in that event they would have to pay full price for the drugs and would be reimbursed by Blue Shield for only a part of that price. Blue Shield offered Pharmacy Agreements to all licensed pharmacies in Texas, but participating pharmacies were required to sell prescription drugs to Blue Shield's policyholders for $2 each, and were reimbursed only for their cost in acquiring the drugs thus sold. "Thus, only pharmacies that [could] afford to distribute prescription drugs for less than this $2 markup [could] profitably participate in the plan." 440 U.S., at 209.
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> Respondents in *Royal Drug* were the owners of nonparticipating pharmacies. They sued Blue Shield and several participating pharmacies under § 1 of the Sherman Act, alleging that the Pharmacy Agreements were the instrument by which Blue Shield had conspired with participating pharmacies to fix the retail prices of prescription drugs. Respondents also alleged that the Agreements encouraged Blue Shield's policyholders to avoid nonparticipating pharmacies, thus constituting an unlawful group boycott.

Pireno, No. 81-389 at 6. The Supreme Court presented the facts of *Pireno* as follows:

> Petitioners are the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, and the Union Labor Life Insurance Company (ULL), a Maryland insurer doing business in New York. As required by New York law, ULL's health insurance policies cover certain policyholder claims for chiropractic treatments. But certain ULL policies limit the company's liability to "the *reasonable* charges" for "*necessary* medical care and services." App. 19a, 22a (emphasis added). Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, ULL must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations, ULL has arranged with NYSCA to use the advice of NYSCA's Peer Review Committee.

(footnote continued from previous page)

'guidelines' the 'focus' of the investigation as regards Mutual then the Commission is without authority to investigate the 'business of insurance.'" *Winters* is distinguishable in a significant manner and is not applicable in the instance case. In *Winters,* the FTC would be prevented from issuing a subpoena to the Winters Bank if the purpose of the investigation was to investigate the Bank but if the purpose was to investigate a third party then the subpoena could issue to the Bank as to any other third party. If the purpose was to investigate unfair or deceptive practices of the bank then the FTC would have exceeded its authority and encroached the realm of exclusive authority of the Comptroller of Currency under 15 U.S.C. §§ 46(a,b), 57a(f)(i), f2(A). In the instant case, some of Mutual's activities would be subject to subpoena and some would not. The question is not whether it is Mutual or someone else that is the subject of the investigation, but instead whether the activity under investigation is the "business of insurance."

> The Committee was established by NYSCA in 1971, primarily to aid insurers in evaluating claims for chiropractic treatments. It is composed of ten practicing New York chiropractors, who serve on a voluntary basis. At the request of an insurer, the Committee will examine a chiropractor's treatments and charges in a particular case, and will render an opinion on the necessity for the treatments and the reasonableness of the charges made for them. The opinion will be based upon such considerations as the treating chiropractor's experience and specialty degrees; the location of his office; the number of visits and time spent with the patient; the patient's age, occupation, general physical condition, and history of previous treatment; and x-ray findings.
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> Respondent is a chiropractor licensed and practicing in the State of New York. On a number of occasions his treatments of ULL policyholders, and his charges for those treatments, have been referred by ULL to the Committee, which has sometimes concluded that his treatments were unnecessary or his charges unreasonable. Petitioners asserts that respondent has treated his patients "in a manner calculated to maximize the number of treatments for a particular condition, and that his fees for these treatments are unusually high." *Pireno v. New York State Chiropractic Ass'n*, 650 F.2d 387, 389 (CA2 1981). Respondent, for his part, contends that the members of the Committee "practice 'antiquated' techniques that they seek to impose on their more innovative competitors." *Ibid.*
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> This dispute resulted in the present suit, brought by respondent in the United States District Court for the Southern District of New York. Respondent alleged that the peer review practices of petitioners violated § 1 of the Sherman Act. In particular, he claimed that petitioners and others had used the Committee as the vehicle for a conspiracy to fix the prices that chiropractors, including respondent, would be permitted to charge for their services. He concluded that he had been restrained from providing his chiropractic services to the public freely and fully, and that would-be recipients of chiropractic services had been deprived of the benefits of competition. Respondent requested, *inter alia,* declaratory and injunctive relief against ULL's continued use of NYSCA's Peer Review Committee in evaluating policyholders' claims.

Pireno, No. 81-389 at 2-4. The Supreme Court then analyzed the *Pireno* facts under the three-criterion standard of *Royal Drug*. In both cases the Supreme Court found that the alleged activities did not constitute the business of insurance, and thus, that the McCarran-Ferguson exemption did not apply.

First, does the practice have the effect of transferring or spreading the policyholders risk? In *Pireno,* the Court said, "Plainly, ULL's use of NYSCA's Peer Review Committee plays no part in the 'spreading or underwriting of a policyholder's risk.'" The Court said that peer review took place only after the contract of insurance was formed and that the purchase of insurance of itself "transferred" the risk. In *Royal Drug*, the Court said that although Blue Shield's "cost-saving arrangement" may eventually benefit the policyholders in the form of lower premiums, they were not the business of insurance.

In the instant case, the alleged restraining activity has the alleged effect of imposing a burden on physician preceptors in that they must directly supervise the nurse practitioners or risk the loss of coverage in the event of a malpractice suit. This situation is sufficiently similar to *Royal Drug* and *Pireno* to make them controlling of this case. This is so because the matter which is under scrutiny is the alleged arrangement between Mutual

Assurance and the Medical Association. Although this arrangement may have some effect on which physicians will be able to transfer their risk to Mutual Assurance, the fact remains that *whether* the risk is transferred is not under scrutiny but instead *what, if any, arrangement* is controlling the terms of the policies which are issued.

Second, is the activity which is being investigated an integral part of the policy relationship between the insurer and the insured? In *Pireno,* the Supreme Court concluded that "it is clear that ULL's use of NYSCA's Peer Review Committee is not an integral part of the policy relationship between the insurer and the insured." The obvious reasons was that ULL's agreement with NYSCA was separate from its contracts with its insureds. The Court pointed to *Royal Drug* and the fact that it had reached precisely the same conclusion in that decision. *Pireno,* No. 81-389 at 10-11.

In the instant case, the arrangement between Mutual Assurance and the Medical Association is under investigation. For the same reasons stated in reference to the first criterion, the business of insurance is not the activity which is apparently under scrutiny.

Third, is the practice or activity which is under scrutiny confined to entities within the insurance industry? Of course, the activities being investigated in *Pireno* and *Royal Drug* were not limited to entities within the insurance industry and the Court found that this was a factor contributing to a finding that the business of insurance was not being investigated. Likewise, in the instant case, the Medical Association is not an insurance company and the third criterion is not satisfied. The Supreme Court in *Pireno* said:

> We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) was intended primarily to protect "*intra*-industry cooperation" in the underwriting of risks. 440 U.S., at 221 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in non-insurance markets. Indeed, the peer review practices challenged in the present case assertedly realize precisely this potential: Respondent's claim is that the practices restrain competition in a provider market—the market for chiropractic services—rather than in an insurance market. App. 8. Thus we cannot join petitioners in depreciating the fact that parties outside the insurance industry are intimately involved in the peer review practices at issue in this case.

Pireno, No. 81-389 at 13.

For the foregoing reasons the court concludes that the activity under investigation in this case is not the business of insurance under § 2(b) of the McCarran-Ferguson Act.[2] The complaint of The Mutual Assurance Society of Alabama is due to be dismissed with prejudice and the counterclaim of the Federal Trade Commission which requests enforcement of its subpoena *duces tecum* is due to be granted in favor of the counterclaimant.

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[2] This conclusion renders it unnecessary to address the question whether the conduct under investigation constitutes a "boycott, coercion, or intimidation" under § 3(b) of the McCarran-Ferguson Act. A review of *St. Paul Marine and Fire*

(footnote continued)

An order in accordance with this memorandum opinion will be entered contemporaneously herewith.

The court takes judicial notice that certain legislation has passed the House of Representatives which, if it becomes law, could possibly moot the proceedings of defendant. This information was imparted to the court by the news media and has been confirmed by consultation with defendant's attorney by the court's law clerk. Plaintiff has not contacted the court concerning this matter.

The court will *sua sponte* stay its judgment in this case and enforcement of defendant's subpoena for a period of thirty days. This stay appears reasonable under the circumstances and is in lieu of withholding this opiion and the court's judgment which was imminent at the time said news was received.

ORDER AND FINAL JUDGMENT

This cause is before this court on Plaintiff The Mutual Assurance Society of Alabama's declaratory judgment action and defendant The Federal Trade Commission's Counterclaim Petitioning To Enforce Subpoena Duces Tecum served previously on The Mutual Assurance Society of Alabama. Pursuant to this court's memorandum opinion entered contemporaneously herewith, this court declares that Mutual Assurance is properly subject to the jurisdiction of the FTC subpoena. Mutual Assurance's complaint is hereby DISMISSED, with prejudice. The court hereby GRANTS judgment in favor of The Federal Trade Commission on its counterclaim petitioning for enforcement of its subpoena served on Mutual Assurance.

The enforcement of this judgment is hereby STAYED for a period of thirty (30) days due to legislation currently before the United States Senate. The memorandum opinion entered contemporaneously herewith contains a more detailed statement of the reasons for this stay of judgment.

(footnote continued from previous page)

Ins. Co. v. Barry, 438 U.S. 531 (1978), indicates that the § 3(b) exception could have been applicable if the facts of the instant case indicated that the business of insurance was being investigated. This court's conclusion that the business of insurance is not the object of this FTC investigation necessarily precludes a finding of a § 3(b) exception because the § 3(b) exception applies only when the business of insurance *is* under investigation.

UNITED STATES
v.
LOUISIANA-PACIFIC CORPORATION*

Civ. No. 81-813-RE FTC Docket No. C-2956

United States District Court, District of Oregon
December 28, 1982

1. **Amount of civil penalty to be assessed for violation of FTC divestiture order is within district court's discretionary authority.**

District Court has discretion to determine the amount of penalty to be imposed for violation of Federal Trade Commission divestiture order.

2. **Size of civil penalty must reflect the seriousness of violating an FTC divestiture order, must penalize the violators, and act as a deterrent to others.**

Penalty to be imposed for violation of Federal Trade Commission divestiture order must reflect the seriousness of the violation, must penalize offenders, and must act as a deterrent to others.

3. **Congress intended that civil penalty for violation of FTC order be viewed as a deterrent to potential violators, not as an acceptable cost of doing business.**

Congress did not intend a penalty, for a violation of Federal Trade Commission divestiture order, that would be regarded by potential violators as "an acceptable cost," as opposed to a deterrent to violation.

4. **In determining a proper civil penalty, five specified criteria must be considered.**

Five criteria are to be considered in arriving at a suitable penalty figure for violation of a Federal Trade Commission divestiture order: (1) the good or bad faith of defendant in violating the order; (2) injury to the public resulting from the violation; (3) benefits derived by defendant from its violative activities; (4) defendant's ability to pay a penalty; and (5) need to deter similar behavior by the violator and others and vindicate the authority of the FTC and the integrity of its orders.

5. **Although injury to the public was minimal, manufacturer had nevertheless failed to exercise good faith in its divestiture attempts, derived substantial benefit from retaining the plant, and had the ability to pay maximum penalty, and thus would be assessed a substantial $4 million penalty, even though deterrence and vindication factors warranted imposition of the maximum penalty.**

Company which violated consent order of the Federal Trade Commission requiring it to divest itself of a manufacturing plant would be assessed the substantial, albeit not maximum, penalty of $4 million; although there was minimal injury to the public, the company failed to exercise good faith in its divestiture attempts, derived substantial benefits from retaining the plant, and had the ability to pay even the maximum penalty; furthermore, deterrence and vindication factors would have warranted the maximum penalty.

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*Reported in 554 F.Supp. 504 (1982). For case before the Commission, see 93 F.T.C. 308.

In a civil penalty action brought by the United States for violation by defendant of [505] Federal Trade Commission order requiring defendant to divest itself of a manufacturing plant, the District Court, Redden, J., held that defendant would be assessed the substantial, albeit not maximum, penalty of $4 million; although there was minimal injury to the public, the defendant failed to exercise good faith in its divestiture attempts, derived substantial benefits from retaining the plant, and had the ability to pay even the maximum penalty; furthermore, deterrence and vindication factors would have warranted the maximum penalty. Order accordingly.

(*Syllabus, with substituted captions, taken from 554 F.Supp. 504.*)

Charles H. Turner, U.S. Atty., *Jack G. Collins,* Asst. U.S. Atty., Portland, Or., *Benjamin P. Schoen,* Consumer Affairs Section, Antitrust Div., Dept. of Justice, Washington, D.C., for plaintiff.

Clifford N. Carlsen, Jr., Michael E. Arthur, Miller, Nash, Yerke, Wiener & Hager, Portland, Or., for defendant.

OPINION

REDDEN, *District Judge*:

Plaintiff United States of America seeks to impose a civil penalty upon defendant Louisiana-Pacific Corporation ("L-P") for its violation of a Consent Order requiring L-P to divest itself of a manufacturing plant in Rocklin, California (hereafter "Rocklin"). It is undisputed that L-P did not in fact divest itself of Rocklin as it had agreed to do. The United States seeks a civil penalty of an amount in excess of $6 million.

I. BACKGROUND

In 1978, the Federal Trade Commission ("Commission") began an investigation into the anticompetitive effects of a proposed [506] merger between L-P and the Fibreboard Corporation ("Fibreboard"). After extensive negotiation between L-P and the Commission, a settlement was reached. On June 26, 1978, L-P and the Commission signed an "Agreement Containing Consent Order" ("Agreement"), FTC Docket No. C-2956. The Agreement contained the full text of a proposed Consent Order which required L-P to divest its plant in Rocklin, California. By signing the Agreement, L-P agreed to waive:

(a) any further procedural steps;
(b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

> (c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to th[e] agreement.

Agreement Containing Consent Order at 1. Further, by signing the Agreement, L-P agreed to abide by all provisions of the Consent Order.

On February 27, 1979, with L-P's consent the Commission issued an administrative complaint and a Consent Order ("Order"). The Order, which was identical to that in the Agreement, became final on March 28, 1979. It required L-P to divest its medium density fiberboard (MDF) plant at Rocklin, California within two years, to an acquirer approved in advance by the Commission. The requirement to divest was absolute and unconditional. The Commission, in return for L-P's agreement to divest the Rocklin MDF plant pursuant to the terms in the Order, terminated its investigation of the L-P/Fibreboard merger.

In February 1980, L-P, pursuant to section 5(b) of the Federal Trade Commision Act, 15 U.S.C. § 45(b), filed a petition to reopen proceedings for the purpose of modifying the Order. This petition, which was amended by letter of June 11, 1980, sought to have the Order modified to eliminate the requirement that L-P divest the Rocklin plant. L-P contended there were changes in fact and law sufficient to warrant modification of the Order to eliminate the divestiture requirement. The Commission, on June 26, 1980, denied L-P's petition to reopen.

On February 27, 1981, L-P requested that the Commission extend by 18 months the time within which it could comply with the divestiture provision. On March 27, 1981, the Commission denied L-P's request for an extension of time. On March 28, 1981, the date by which L-P was to have divested the Rocklin plant, L-P still retained the plant.

On June 25, 1981, three months after the compliance period had ended, L-P filed another petition to reopen and modify the Order. This second petition incorporated the first petition *in toto* and alleged additional changed facts and law which L-P argued were sufficient to warrant reopening of the Order and modification or elimination of the divestiture requirement. The Commission denied the second petition to reopen on July 31, 1981.

II. PROCEDURAL HISTORY OF THE CASE

On September 4, 1981, the United States filed a complaint against L-P seeking civil penalties and mandatory injunctive relief pursuant to section 5(*l*) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(*l*). The complaint charged L-P with violating the Order of the Federal Trade Commission by failing to divest the Rocklin MDF plant as required under the Order.

On October 1, 1981, defendant L-P filed its answer to the government's complaint and also filed a counterclaim. The counterclaim alleged that the Commission improperly denied L-P's second petition to the Commission to reopen and modify the Order to eliminate the requirement to divest. The counterclaim essentially sought two remedies: first, that no penalties be assessed against L-P for failing to divest as required by the Order; and second, that the Court hold the Commission's denial of the second petition to reopen the Order arbitrary or capricious or not in accordance with law [507] and remand the matter to the Commission for reconsideration.

On December 15, 1981, the United States filed its Reply to the Counterclaim, denying the allegation that the Commission's refusal to reopen the Order pursuant to L-P's second petition to reopen was improper.

On December 28, 1981, the United States moved for summary judgment on its affirmative claim. Oral argument was held on February 16, 1982. The government's motion was granted on February 23, 1982. This Court held that L-P violated the Order by not divesting Rocklin by March 28, 1981. L-P did not in fact contest this aspect of the government's case, i.e., the fact that L-P had not divested Rocklin.

On February 26, 1982, the United States moved for summary judgment on L-P's counterclaim. Oral argument was heard on that motion on April 19, 1982. This Court granted the government's motion for summary judgment on the counterclaim in an Opinion and Order of May 3, 1982, holding that the Commission's action in denying L-P's petition to reopen was not wrongful and that there was substantial evidence in the record to support the Commission's denial.

The issue now before the court is the amount of the penalty[1] to be assessed L-P for violating the Order, and whether equitable remedies should be imposed to enforce said order.

III. THE APPLICABLE LAW

[1-3] This court has discretion to determine the amount of the penalty to be imposed for violation of the divestiture order. *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 229 n. 6, 95 S.Ct. 926, 930 n. 6, 43 L.Ed.2d 148 (1975); *United States v. J.B. Williams Co.,* 498 F.2d 414, 438 (2d Cir. 1974). A civil penalty of up to $10,000 per day may be assessed for each day of the continuing violation. I follow established standards which aid me in the exercise of my discretion. The penalty must reflect the seriousness of the violation, must penalize offenders and act as a deterrent to others. *United States v. Floersheim,* 1980-2 Trade Cas. (CCH), ¶ 63,368 (C.D.Cal. 1980), *aff'd,* 659 F.2d 1090 (9th Cir. 1981); *United States v.*

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[1] Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), states:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than *$10,000 for each violation,* which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, *each day of continuance of such failure or neglect shall be deemed a separate offense.*

(Emphasis added).

Beatrice Foods Co., 351 F.Supp. 969, 971 (D.Minn. 1972), *aff'd in an unpublished opinion,* 493 F.2d 1259 (8th Cir. 1974), *cert. denied,* 420 U.S. 961, 95 S.Ct. 1350, 43 L.Ed.2d 438 (1975). Congress did not intend a penalty that would be regarded by potential violators as "an acceptable cost," as opposed to a deterrent to violation. *United States v. ITT Continental, supra,* 420 U.S. at 231, 95 S.Ct. at 932.

[4] I look at five separate criteria in my effort to arrive at a suitable penalty figure: (1) the good or bad faith of the defendant in violating the order; (2) the injury to the public resulting from a violation; (3) the benefits derived by the defendant from its violative activities; (4) the defendant's ability to pay a penalty; and (5) the need to deter similar behavior by the violator and others and vindicate the authority of the Federal Trade Commission and the integrity of its orders. *See, e.g., United States v. Reader's Digest Association, Inc.,* 494 F.Supp. 770 (D.Del. 1980), *Aff'd,* 662 F.2d 955 (3d Cir. 1981), *cert. denied,* 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982). *United States v. J.B. Williams Co., supra; United States v. Papercraft Corp.,* 393 F.Supp. 415, 420 (W.D.Pa. 1975), *aff'd in part* and *rev'd in part,* 540 F.2d 131, 141 (3d Cir. 1976); *Federal Trade Commission v. Consolidated Foods Corp.,* 396 F.Supp. 1353, 1356-57 (S.D.N.Y. 1975); and *United States v. Swingline,* 371 F.Supp. 37 (E.D.N.Y. 1974). **[508]** I allocate to the United States the burden of proof on these five issues.

IV. DISCUSSION

A. *Good or Bad Faith*

Thorough and extensive briefings, numerous hearings and conferences, hundreds of exhibits and three days of trial revealed an extensive history of the defendant's unsuccessful attempts to divest Rocklin within the period allowed. The plaintiff takes the position that those efforts were inadequate, indeed minimal, and did not constitute good faith efforts to comply with the consent decree. The defendant is equally adamant that it did everything it could to divest itself of the plant, but that circumstances beyond its control prevented the divestiture. The most pertinent of the information will be discussed below.

It was the intention of the defendant to acquire Fibreboard, and it succeeded in this effort in March of 1978. This acquisition included the acquisition of Rocklin. Rocklin's book value, *as reflected by Fibreboard,* was $8.46 million. The agreement between these parties was signed June 26, 1978 with defendant agreeing to divest Rocklin and plaintiff agreeing to drop its investigation and any opposition to the L-P-Fibreboard merger. Various values were placed upon Rocklin: its book value of $11.7 million;[2]

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[2] *See* trial transcript at p. 57. L-P's book value of $11.7 million differs from Fibreboard's book value for Rocklin of $8.46 million due to investments in the plant made by L-P.

a "tax basis" of $12 million;[3] an estimated sale price/fair value of $20 million; a "replacement" value of $21 million; an "inhouse" evaluation of $12-$15 million; an "independent" appraisal price of $35 million a "probable value" of $6-8 million[4] and asking prices of up to $40 million. The only conclusion supported by the evidence is that Rocklin was worth what defendant could get for it. On February 27, 1979, the Order was entered. It became final on March 28, 1979, and the defendant had two years, until March 28, 1981, to complete divestiture. As of the trial of this case, which commenced on the 4th day of November, 1982, defendant had not yet fully complied.

The record reflects the following facts which are most relevant on the issue of good or bad faith. The parties frequently point to the same fact to prove what one regards as evidence of good faith, and the other of bad faith.

Defendant took no preparatory actions between the signing date of June 26, 1978 and the filing date of the Consent Order of February 27, 1979. The Order became final on March 28, 1979 and defendant had two years to comply. The first real efforts took place in July of 1979, although inquiries were responded to prior to that month. Defense witnesses testified that they responded to inquiries and built a file of potential purchasers. On July 31, 1979, defendant sent a packet of material to twelve entities it considered potential purchasers. The asking price was $35 million for the plant, cash at closing. The government contends that the asking price was designed to be so high as to discourage offers, while the defendant claims that it was a fair asking price. The government contends that the defendant should have sought professional help (investment bankers or brokers) and contacted a larger number of potential purchasers—certainly more than just twelve. Defendant contends it was traditional to act as its own broker and that it knew all of those who would be both interested and capable of the purchase of Rocklin. Defense witnesses testified that they were confident the plant would sell for their figure of $35 million, or close to it, within a brief period of time. In any event, the **[509]** formal offers to sell which were issued on July 31, 1979, were, in effect, withdrawn on August 28, 1979, approximately one month later. At that time, the defendant sent the twelve potential purchasers a letter advising them that they were involved in another merger effort and could not take the time to negotiate the sale of Rocklin. Defense witnesses say that they were also considering a petition to the FTC which sought a modification of the divestiture order. They took the position that they had a proposition which would satisfy both the needs of the government and of itself and which they believed the government would accept. Defendant claims that these two facts, plus its confidence in its ability to sell at a good price, and in short order, demonstrate its good faith.

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[3] The use of such a "tax basis" is questionable in L-P's case. Due to favorable treatment of capital gains for timber corporations, L-P's tax rate is almost non-existent. In 1981, L-P paid no taxes on its earnings, despite net income of $26,280,000. *See* trial transcript p. 317; Exhibit 7 (1981 Annual Report of L-P) at p.2.

[4] *See* trial transcript at pp. 57-59. This was the estimate of Don Kayser, L-P's Vice-President of Financing and Administration, of the value of Rocklin when it was still owned by Fibreboard.

Harry Merlo, defendant's Board Chairman, testified that he had informally approached the FTC with his proposition.[5] Defendant had received legal advice from an attorney, well versed in FTC proceedings, to the effect that the FTC would likely agree to a modification. The FTC denied the petition, however. In the fall of 1979, defendant pumped $3.4 million into Rocklin under a plan approved in June of 1979, four months after the order entered. Defendant claims that these expenditures were to make Rocklin saleable. The plaintiff claims that these expenditures proved that defendant had not yet concluded that it would ever be required to divest.

It was not until July of 1980 that defendant officially put Rocklin back on the market. It did so by corresponding with selected prospective purchasers. Although the plant had not been "marketed" since August of 1979, defendant claims that any offer, inquiry or request for inspection would have received prompt attention. Their correspondence did not indicate such, nor did they invite offers, inquiries or inspections. The United States proved by a preponderance of the evidence that L-P did not make any significant effort to divest prior to July of 1980, when the divestiture period had already run for almost a year.

The government points out, quite appropriately, that from August of 1979 through July 9, 1980, which is 40% of the two year divestitute period, Rocklin was "off the market." Defendant challenges the claim but does admit that its efforts lacked the maximum effort during those months.

The asking price, in July of 1980, was increased to $40 million. Defendant contends that the price reflected additional investment in Rocklin, as well as the inflation factor and its effect upon replacement costs. The plaintiff contends that raising the price guaranteed that there would be no divestiture. The government points out that on April 10, 1980, June 26, 1980, December 18, 1980, and February 5, 1981, the FTC staff wrote to defendant, warning it that time was running out and that the obligation to divest was absolute. The defendant was also warned that a penalty proceeding such as this one would be instituted if it failed to comply with the consent decree. The July 1980 offer to sell ($40 million) was sent, by defendant, to only seven potential purchasers. No offers were received in response to these letters and, in November of 1980, defendant put Rocklin up for bid. Only those who had previously expressed a serious interest in Rocklin were contacted and asked to bid. Three bids were received, all of which were in the $20-$25 million range. Defendant *rejected* all three bids. Defendant did not correspond with any of the bidders, but its officers did testify that contact was made with Roseburg Lumber, by telephone, to ascertain whether or not Roseburg Lumber would "get its figure up to the $30 million **[510]** vicinity." Roseburg Lumber Company declined. Defendant claims that the bids were rejected as "too low," and asserts that acceptance of such bids would have violated management's perceived duty to shareholders. Defendant also excuses its rejection of the Roseburg Lumber bid on the grounds that a condition of that bid was that L-P was to terminate all Rocklin employees. Defense witnesses testified that they felt acceptance of this condition would violate their perceived duty towards those employees. However, in their attempts to negotiate with Roseburg Lumber by telephone following receipt of the bid, there was no discussion of the employee situation. L-P simply sought a higher price and did not refer to a concern for the employees.

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[5] L-P hoped to persuade the FTC to allow L-P to close certain other plants, in Ukiah, California, and in the southern part of the United States, which produced primarily particleboard. The Rocklin plant produces Medium Density Fibreboard (MDF), a similar product, but with properties which are far superior to regular particleboard. MDF's advantages over particleboard are such that Mr. Merlo described MDF as "the product of the future" in the compressed-wood field. Mr. Merlo presented his plan to three Commissioners. The FTC rejected the proposal to allow L-P to keep Rocklin's MDF potential by divesting itself of particleboard capacity. *See* trial transcript at p. 247 and p. 37.

Four months remained in the divestiture period, but defendant's record of efforts to sell before expiration is nonexistent. Defendant was in violation on March 28, 1981. On April 21, 1981, it again attempted to negotiate with Roseburg Lumber. Defendant continued to ask $40 million for the plant in its sporadic correspondence in the months following March of 1981. The books reflect that interest rates had spiraled and that profits at Rocklin had been drastically reduced by that time.

Defendant cites high interest rates as the reason for the lack of offers. The United States concedes interest rates were at very high levels, but urges convincingly that this factor should have caused L-P to accept the $20 million bid for a plant with a book value of $8½ million to $12 million.

Defendant eventually consulted an investment broker in September of 1981. That individual was of no assistance. His action in L-P's behalf was perfunctory, and merely involved a review of L-P's efforts to date and the statement that they were sufficient. This individual spent a part of one day working on the problem.

Defendant's witnesses testified generally that they were not "concerned" about their ability to comply by a sale of the plant until the bids were rejected in November of 1981. Then, the industry was in such bad shape that a reasonable sale was, they felt, impossible.

Finally, it should be noted that on the eve of trial, counsel for L-P informed the court that L-P had concluded an agreement "in principle" to sell Rocklin to Roseburg Lumber Co. for $15 million. It is not known whether this will be an approved divestiture.

Defendant's efforts to sell and comply were minimal. I find that defendant hoped that various petitions to the FTC as well as an amendment to the statute, would result in a modification of the order to divest. The FTC, however, never encouraged this hope but, as a matter of fact, repeatedly warned the defendant that this day was coming. I am required to find, and do find, that defendant did not, in good faith, attempt to divest itself of Rocklin. During the prescribed period L-P's officers did have, from time to time, reason to believe that they could defer sale and still comply. As reasonable businessmen they could have believed that the FTC might modify the order or extend the period of divestiture. However, defendant's conduct, from the signing of the order until the final date of the divestiture, viewed in its entirety, indicates a failure to make good faith efforts to comply.

The asking price was too high. It was set at a figure which, if not completely discouraging to potential purchasers, certainly did not encourage them. It is worthy of note that defendant was warned on four separate occasions by plaintiff, and plaintiff also advised L-P that L-P's desire for a subjectively desired price was not to be pursued in disregard of the Order. Defendant failed to reduce the price as time was expiring and, in fact, increased the price with time running out. Further, it maintained the demand for $40 million even after the divestiture period had expired.

B. *Public Harm*

No issue is more hotly contested than this. L-P contends that the government has been wrong from the outset and, further, that new "guidelines" employed by **[511]** the United States Department of Justice would have allowed L-P to acquire Fibreboard, without divesting Rocklin. The plaintiff protests this reasoning, pointing out that L-P chose not to contest the earlier allegations, signed a consent order and waived its right to challenge the original action. I do not consider the correctness of the government's position in filing its initial administrative complaint. I do not question the motives or wisdom of L-P's signing of a consent order. They did so, and it must be assumed that divestiture would have enhanced competition and decreased centralization. *See United States v. Reader's Digest, supra,* at 969; *United States v. Papercraft, supra,* at 426-427. It is true, nevertheless, that minimal harm was inflicted upon the public. This may well have come about from the disastrous turn in the economy, and its effect on the timber industry, but nonetheless there seems to have been little public harm resulting from L-P's failure to divest Rocklin. Therefore, I find that public harm, which I assume, is not a factor in determining the size of the penalty. *Federal Trade Commission v. Consolidated Foods, supra,* at 1357.

C. *Benefit to L-P*

I must consider the benefits which flow to L-P because of retention of Rocklin. The most obvious method of measurement is profit to L-P resulting from acquisition, retention and operation of Rocklin. As might be expected, the parties' calculations and computations differ and their conclusions are mutually inconsistent. It *is* clear that the profits L-P realized from Rocklin diminished with the passage of time during the divestiture period. Defendant insists that benefits, i.e., earnings, prior to the divestiture deadline of March 27, 1981 must be ignored, and that earnings from that date to the present are the sole test. I disagree. During the divestiture period, the projected profits from Rocklin were sufficient to exceed the maximum penalty which can be assessed in this case, i.e., $3.65 million per year.[6] I consider those benefits in my decision and will refer to L-P's lack of incentive in my discussion regarding deterrence. The market has deprived L-P and its industry competitors of their high cash earnings of late, but defendant has, in fact, benefited from holding and operating Rocklin, even *after* the divestiture deadline. From expiration to August of 1982, defendant admitted profits from Rocklin of $548,683.00.[7] Plaintiff correctly points out that L-P still has Rocklin as an asset and is still negotiating for a profitable disposition. I find that L-P has benefited from retention of Rocklin and this is an element I will consider in assessing the penalty.

D. *Ability to Pay*

In spite of an economy that has devastated defendant and its competitors, L-P remains a strong company in excellent financial condition. The 1981 sales and 1981 assets each exceeded $1 billion. Its 1981 net income was over $26 million. This year, 1982, will not be a good year, however, and L-P contends it will be required to borrow in order to pay any substantial penalty. Plaintiff, however, points to the recent acquisition by defendant of stock in National Gypsum. Defendant acquired National Gypsum stock with a cash outlay of $7 million over a four day period.[8] Plaintiff also points to L-P's "jet plane fleet" of seven aircraft as a source of assets convertible to cash. I find that L-P has the ability to pay even the maximum fine without, as L-P admits in its 1981 annual report: "a [512] materially adverse effect on [its] business or financial condition. . . ."[9]

E. *Deterrence and Vindication*

Another objective in arriving at the fine to be assessed is the deterrence of the violator and others, as well as vindication of the plaintiff FTC. I have concluded that L-P fell short of good faith in its attempts to divest Rocklin and a deterrent is called for—one that will deter L-P in the future as well as others that would regard a modest penalty as an acceptable cost of doing business. Delay in compliance must be discouraged, not encouraged. There must be an incentive to comply with such orders. *United States v. Papercraft, supra,* at 420 and 426; *United States v. ITT Continental Baking, supra,* at 932.

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[6] *See* trial transcripts at p. 211. Rocklin had profits of $4 million in 1979 and had projected profits of $4.2 million in 1980. The maximum penalty which may be assessed in this case is $3.65 million per year.

[7] *See* trial transcripts at pp. 264-265.

[8] At the time of trial the total value of L-P's stock in National Gypsum was between $55,000,000 and $60,000,000. In four consecutive trading days early this year, L-P acquired over 220,000 shares in National Gypsum. *See* trial transcript at pp. 375-376.

[9] L-P will also soon be the recipient of a payment from the government in the amount of $210 million for timber lands acquired for the Redwood National Park in California. It was this acquisition by the government which led L-P to pursue the Fibreboard merger in order to replace the timber lands sold to the government. L-P acquired Fibreboard, which includes timber resources comparable to those sold to the government, as well as the Rocklin plant, the Northstar ski resort at Lake Tahoe, and numerous other assets, for $185 million. *See* trial transcript at pp. 24-25, 62, 276.

Further, vindication of the FTC is an important element. Congress has armed the FTC with powers and responsibilities and its orders should not be disregarded with impunity. *Federal Trade Commission v. Consolidated Foods Corp., supra,* at 1357. Defendant argues that changes in the national administration and in the Department of Justice mean that the FTC would not be authorized to order the divestiture today that L-P agreed to in 1978. I know of no authority to consider such speculations in this case. In fact, the present administration has pursued this case vigorously.[10]

V. INJUNCTIVE RELIEF

This court denies, for the present, plaintiff's request for an injunction and appointment of a trustee to pursue divestiture. A status conference will be scheduled approximately 30 days from issuance of this opinion and order to determine whether either request will be necessary.

VI. CONCLUSION

[5] I have found that L-P failed to exercise good faith in the divestiture of Rocklin; that there has been minimal injury to the public as a result; that L-P derived substantial benefits from retention of Rocklin; that L-P has the ability to pay even the maximum penalty; and that the deterrence and vindication factors warrant the maximum penalty.

I also realize that there has not been a worse time to sell, a worse market or tougher financial times for L-P in its relatively short business history. However, as to the Rocklin divestiture this case and the FTC's unrelenting drive for the maximum penalty show that defendant was, and remains, overly optimistic.

I find that for reasons stated throughout this opinion the *maximum* penalty is not warranted. I also find, however, for reasons stated throughout this opinion, that a substantial penalty is warranted. I therefore conclude that the penalty to be assessed herein shall be $4 million, which is an amount both justified and required.

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[10] At the time of trial, L-P also sought to introduce into evidence certain letters from counsel for the government. The asserted basis for the offer was that the government had delayed bringing this action for some period of time, and that this exercise of prosecutorial discretion had prejudiced L-P. Over the objection of the government that these documents were irrelevant, I did in fact examine them. They reveal that the government has prosecuted this case expeditiously.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

CONOCO, INC.
v.
FEDERAL TRADE COMMISSION, et al.*

C.A. No. H-81-1659 FTC File No. 81-7-020

United States District Court, Southern District of Texas
December 29, 1982

In an FOIA action in which an oil and gas company sought nine FTC documents relating to the 1981 acquisition of Houston Oil Minerals Corp. by Tenneco, Inc., court granted in part and denied in part both FTC's motion for summary judgment and plaintiff's cross motion for summary judgment. After examining the documents *in camera*, court found that FTC had properly withheld four of the documents as well as the Premerger Notification and Report Form Summary, pursuant to exemptions provided by the Hart-Scott-Rodino Act and the FOIA. However, the five remaining documents contained purely factual information and were subject to disclosure.

Before BUE, JR., *District Judge.*

ORDER

Defendants, the Federal Trade Commission, (FTC), a federal agency empowered by 15 U.S.C. §§ 45, *et seq.* (1980) to prevent certain unfair methods of competition, deceptive acts or practices; Ernest J. Isenstadt, Acting General Counsel of the FTC; Carol M. Thomas, Secretary of the FTC; and, Benjamin S. Sharp, a Commission deputy director, filed a motion on July 27, 1982, pursuant to rule 56, Fed.R.Civ. P., for entry of an order finding the materials plaintiff seeks non-disclosable under exemptions 3 and 5 of the Freedom of Information Act, 5 U.S.C. § 552 (1976), (hereinafter referred to as "FOIA") and, thereby, granting summary judgment in defendants' behalf. Shortly thereafter, on September 7, 1982, plaintiff, Conoco, Inc., an oil and gas company, filed its motion for summary judgment and contends therein that the documents they seek are not subject to either the attorney work-product privilege, executive privilege or the statutory mandate prohibiting disclosure claimed by defendants. This Court has subject-matter jurisdiction over this case pursuant to subsection (a)(4)(B) of the FOIA and in accord with that section's directive has exercised its prerogative to review the disputed documents *in camera*. Following a review of the parties' motions and the nine documents submitted by defendants,[1] this Court concludes that all of the documents, with the exception of one page attached

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[*] Not otherwise reported.

[1] An affidavit prepared by the Secretary of the FTC and submitted in support of the defendants' motion for summary judgment avers that the nine documents present the only materials responsive to plaintiff's request. Both the FTC's index and the exhibits describe the documents, as follows:

(1) Memorandum from Frank Lipson to Ronald B. Rowe entitled, *Tenneco's Acquisition of Houston Oil and Mineral (HOM)*;

(2) Document entitled, *Description of Tenneco and Houston Oil and Mineral Merger*, signed by Judy Carman;

(*footnote continued*)

to the end of exhibit 1 entitled "Premerger Notification and Report Form Summary", and exhibits 6, 7, 8 & 9, are subject to disclosure under the Freedom of Information Act.

On March 13, 1981, plaintiff requested, pursuant to the FOIA's sections (a)(2)(A), (a)(2)(B) and (a)(3), that the FTC supply it with any and all documents reflecting the agency's rationale for not opposing the Spring, 1981 acquisition of the Houston Oil and Minerals Corp. (HOM) by Tenneco, Inc. The agency rejected the request on March 31, 1981, claiming that the items sought were exempt from disclosure by sections (b)(5) and (b)(3) of FOIA and section 18(a)(h) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 18 a, *et seq.* (1976), (hereinafter referred to as, "H-S-R Act"). Plaintiff appealed the agency's determination to the FTC General Counsel who, in denying plaintiff's request, affirmed the agency decision on June 4, 1981. Plaintiff has exhausted its administrative remedies in accord with section (a)(6)(A) of the Act. *See also, Cazalas v. United States Dept. of Justice,* 660 F.2d 612, 621 (5th Cir. 1981). Plaintiff, thereafter, commenced this cause on June 26, 1981, requesting the Court to enjoin the agency from withholding the sought after information.

The Freedom of Information Act was enacted to "ensure an informed citizenry, vital to the functioning of a democratic society" through a policy of broad disclosure of government documents. *FBI v. Abramson,* 456 U.S. 615, 102 S.Ct. 2054, 2059 (1982); *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978); *EPA v. Mink,* 410 U.S. 73, 80 (1973). However, Congress realized that legitimate governmental and private interests could be harmed by the release of certain types of information and, therefore, provided nine specific exemptions under which disclosure could be refused. *FBI v. Abramson, supra; Dept. of Air Force v. Rose,* 425 U.S. 352, 361 (1976). The FOIA exemptions are to be narrowly construed in favor of disclosure, and the burden is on the withholding agency to prove that the requested information falls within the ambit of one or more of the asserted exemptions. *EPA v. Mink, supra,* at 93; *Kent Corp. v. NLRB,* 530 F.2d 612, 618 (5th Cir.), *cert. denied,* 429 U.S. 920 (1976). This Court's review of the matter *sub judice* is to be conducted *de novo* and is in no way constrained by the agency's prior determinations. *See,* § 552(a)(4)(B); *see also, Dunaway v. Webster,* 519 F.Supp. 1059 (N.D.Cal. 1981).

(footnote continued from previous page)

(3) Document entitled, *Houston Oil & Mineral Corp.*, signed by Nancy Ovuka;

(4) Document entitled, *Reasons for Tenneco's Desire To Merge with Houston Oil and Minerals,* signed by Judy Carman;

(5) Document entitled, *Description of Tenneco, Inc.*, signed by Judy Carman;

(6) Document entitled, *Potential Competitive Effects of Acquisition,* signed by Mark L. Rosenberg;

(7) Memorandum from Connie Salemi to Frank Lipson, Greg Fox and Mark Rosenberg entitled, *Adequacy of Concentration Ratios in Tenneco Houston Oil & Gas Merger*;

(8) Memorandum from Frank Lipson to the Tenneco, Inc. file entitled, *Conversation with Joe Mulholland on February 4, 1981;* and,

(9) Memorandum from Greg Fox to Frank Lipson and Connie Salemi entitled, *Gebgraphic Market for the Tenneco-HOM Merger.*

Exemption 3 of the FOIA provides that the Act's disclosure requirements do not apply to matters that are specifically exempted from disclosure by statute, if that statute requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3); *see also, Watson v. IRS*, 538 F.Supp. 817, 819 n.3 (S.D.Tex. 1982). Section a(h) of the H-S-R Act specifically exempts materials furnished under the H-S-R from disclosure pursuant to FOIA requests by providing that,

> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

15 U.S.C. § 18a(h) (1976).

Prior to its acquisition of HOM, Tenneco submitted a premerger notification form and exhibits, detailing among other things information concerning the nature of the proposed take-over and the competitive effects of the acquisition, in conformance with the H-S-R Act. The H-S-R Act mandates the submission of preacquisition material by the acquiring and acquired entities to afford to the FTC and the Antitrust Division of the United States Justice Department an opportunity to evaluate the competitive effects of attempted corporate take-overs in order to determine whether to challenge the acquisition prior to its consummation. *Heublein v. FTC,* 539 F.Supp. 123, 124 (D.Conn. 1982). Plaintiff made it quite clear in its administrative appeal that it has no desire to obtain any material submitted pursuant to the H-S-R Act, and our review of the material submitted *in camera* reveals that the documents, with the exception of the aforementioned premerger notification form, were prepared entirely by FTC staff personnel. A reading of exhibit 6 discloses, however, that this document contains the writer's specific mention of data garnered from material submitted pursuant to the H-S-R Act and cites the referenced authority.[2] Because we determine that the balance of exhibit 6 reflects an attorney's work-product, the document cannot be disclosed following an excision of the matter which offends section (b)(3) of the FOIA and 15 U.S.C. § 18a(h). The Court concludes, therefore, that both the Premerger Notification and Report Form Summary, which is attached to exhibit 1 and was prepared pursuant to the H-S-R Act and the aforementioned portions of exhibit 6, are exempted from public review by 5 U.S.C. § 552(b)(3). The remaining documents, however, were not filed by either Tenneco, Inc. or HOM pursuant to the H-S-R Act and accordingly, cannot be withheld under the auspices of exemption 3.

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[2] Exhibit 6, at 17-20 and 24.

The FOIA's exemption 5, which provides that,

> This section does not apply to matters that are—
>
> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

5 U.S.C. § 552(b)(5); seeks to withhold from a member of the public, documents which a private party could not discover in litigation with the agency. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 148 (1975); *EPA v. Mink, supra,* at 85-86. The purpose of the exemption is to protect the "predecisional materials reflecting deliberative or policy processes." *EPA v. Mink, supra,* at 87-89; *FBI v. Abramson, supra,* at 2064; *Skelton v. United States Postal Service,* 678 F.2d 35, 38 (5th Cir. 1982); *Wu v. National Endowment for Humanities,* 460 F.2d 1032, 1034 (5th Cir. 1972), *cert. denied,* 410 U.S. 926 (1973). In securing from public scrutiny the give-and-take of agency deliberative processes, exemption 5 confers two forms of privilege — the executive privilege which protects documents reflecting the advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated, *NLRB v. Sears, supra,* at 148; *Hoover v. United States Dept. of Interior,* 611 F.2d 1132, 1139 (5th Cir. 1980); *Wu, supra,* at 1033; and, the attorney work-product privilege which secretes memoranda prepared by an attorney in contemplation of litigation setting forth the attorney's theory of the case and his litigation strategy. *NLRB v. Sears, supra,* at 154.

In ascertaining whether the disputed material falls within the scope of exemption 5, this Court must make a two-pronged inquiry. First, the Court must determine whether the information sought is contained in an agency memorandum. Once the Court determines that the documents are indeed inter or intra-agency memoranda, we must then glean whether the documents contain material which would not be available by law to a party in litigation with the agency. *FOMC v. Merrill,* 443 U.S. 340, 352 (1979); *Skelton, supra,* at 38; *Hoover, supra,* at 1138-1139. The nine documents submitted for our review are clearly memoranda, prepared either by FTC staff members or other federal agency personnel. To determine, however, whether the material can be deemed subject to an asserted executive privilege and, therefore, not available to plaintiff had it pursued the documents through discovery in private litigation, the Court must ascertain whether the documents contain purely factual matters as opposed to deliberative analysis. *Skelton, supra; Wu, supra,* at 1033. Purely factual material, which is generally discoverable under Fed. R.Civ.P. 26(b), by private parties engaged in litigation before the federal bench, is not protected from disclosure by exemption 5. In contrast, advice, recommendations, opinions, and other subjective material are protected. *Wu, supra,* at 1032. Generally, the documents at issue reflect purely factual material. However, exhibit 8 is an FTC attorney's interpretation of a conversation held between himself and an agency economist concerning the proper methods of evaluating market concentration in the natural gas industry. The memorandum is addressed to the Tenneco, Inc. file and reflects its writer's predecisional and deliberative processes in assessing the economist's theories of market concentration evaluation. The writing expresses no final agency decision and merely reflects in its entirety the author's evaluation of facts and opinions related to him by another staff member. Courts recognize that an analysis and evaluation of facts are a great part of the deliberative process. *Skelton, supra,* at 38; *Wu, supra,* at 1033. Where, as here, the document merely reflects the writer's predecisional deliberative processes and an evaluation of facts based on his own values and perceptions, the writing must be accorded the executive privilege. *See, id.*, at 39; *see also, Mead Data Central, Inc. v. United States Dept. of Air Force,* 575 F.2d 932, 935 (D.C.Cir. 1978). This Court finds, however, that exhibit 8 is the sole document deserving of the executive privilege.

As heretofore stated, the documents in question contain for the most part factual matter. Nonetheless, purely factual matter not protected by an executive privilege may be withheld under exemption 5 if the material constitutes attorney work-product. *Kent Corp. v. NLRB, supra,* at 624. The attorney work-product privilege is equally applicable to private and government attorneys, *NLRB v. Sears, supra,* at 154. The privilege seeks to subserve the interest in "preserving the independence of lawyers through the avoidance of unwarranted intrusion into their private files and mental processes." *Hickman v. Taylor,* 329 U.S. 495; *McCorstin v. United States Dept. of Labor,* 630 F.2d 242, 245 (5th Cir. 1980); *Kent Corp., supra,* at 623. Rule 26(b)(3), Fed.R.Civ. P., provides that in the federal courts the privilege may be invoked only for those materials prepared by a party's attorney or other representative in anticipation of litigation or for trial. Exhibits 6, 7, 8 and 9 were prepared by FTC staff attorneys. The mere fact that an agency document was written by a lawyer does not necessarily make it attorney work-product, nor does it matter that litigation never ensued. *Hickman, supra.* The writing must, however, reflect an assemblage of information, opinions, theories or mental impressions acquired in contemplation of forthcoming litigation. *Id.* at 511. Exhibits 6, 7, and 8 and 9 reflect their writers' sifting of gathered information and the resultant mental impressions following its evaluation in contemplation of possible agency litigation. Exhibits 6, 7, 8 and 9 are, therefore, exempt from disclosure under section (b)(5) of the FOIA.

The remaining documents, exhibits 1, 2, 3, 4 and 5, are purely factual recitations which reflect no predecisional processes, nor do they communicate some legal strategy or reveal that they are attorney work-product prepared in anticipation of trial. Accordingly, the Court finds that exhibits 1, 2, 3, 4 and 5 are not exempt under sections (b)(3), or (b)(5) of the FOIA. Further, the Court concludes that portions of exhibit 6 and the Premerger

Notification and Report Form Summary are exempt, pursuant to section (b)(3) of the FOIA and section 18a(h) of the H-S-R Act. Finally, the Court determines that exhibits 6, 7, 8 and 9 are privileged as attorney work-product and that exhibit 8 is also subject to the executive privilege; hence these documents are exempt from disclosure by section (b)(5) of the Freedom of Information Act.

The defendants' motion for summary judgment is, therefore, granted with respect to exhibits 6, 7, 8 and 9 and the Premerger Notification and Report Form Summary attached to exhibit 1; in all other respects the defendants' motion is denied. The plaintiff's motion for summary judgment is granted with respect to exhibits 1, 2, 3, 4 and 5 and in all other respects it is denied.

FEDERAL TRADE COMMISSION
v.
GLENN W. TURNER*

No. 79-474-Orl-Civ-R FTC Docket No. 8888

United States District Court, Middle District of Florida
December 29, 1982

In an action for consumer redress, court granted FTC's motion for partial summary judgment. Court noted that liability for consumer redress under the FTCA requires entry of a final FTC cease and desist order applicable to defendant, and a showing that the acts and practices to which the order relates constitute activity "which a reasonable man would have known under the circumstances was dishonest or fraudulent." FTC's cease and desist order which barred respondent from participating in marketing programs in which financial gain to participants hinged on their recruitment of others; and prohibited him from misrepresenting the availability of products, anticipated business costs, and the amount of money to be made from the sale of products and distributorships, had been affirmed on appeal and was now final. Findings of fact adopted by the Commission demonstrated that defendant's activity, which was the subject of the cease and desist order, constituted conduct which a reasonable man would have known under the circumstances was reasonably calculated to deceive persons of ordinary prudence and comprehension. Court, therefore, concluded that there was no genuine issue of fact with respect to defendant's liability, and while issues of fact and law with respect to the appropriate amount and type of redress exist, those are the only issues remaining for adjudication.

MEMORANDUM OF DECISION

REED, *Judge*: On 7 June 1982, this cause came on for hearing on plaintiff's Motion for Partial Summary Judgment filed 5 April 1982. Plaintiff claims that there is no genuine issue of material fact as to the defendant's liability for consumer redress and that plaintiff is entitled to a judgment as a matter of law on the issue of liability. A certified copy of the record before the Federal Trade Commission, a self-authenticating document under Federal Rule of Evidence 902(4), is attached to the complaint and forms the evidentiary basis for the motion. Under Section 57b of Title 15, United States Code, such liability depends: (a) upon the entry by the Commission of a final cease and desist order applicable to the defendant, and (b) a showing by the Commission that the act, or practice to which the cease and desist order relates is "one which a reasonable man would have known under the circumstances was dishonest or fraudulent."

The Administrative Law Judge who received evidence in connection with the Commission's complaint against the defendant found that the defendant directly and through others knowingly engaged in certain deceptive acts and practices in connection with the sale of distributorship interests

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*Reported in Trade Reg. Rep. ¶ 65,244 at 69,448 (1983-1 Trade Cases). For case before the Commission, *see sub nom. Koscot Interplanetary, Inc., et al.*, 86 F.T.C. 1106.

in Koscot Interplanetary, Inc. See paragraphs 25, 31 through 130, and 132 through 139 of the Administrative Law Judge's initial decision. The Commission on 18 November 1975 adopted the Administrative Law Judge's findings of fact (with immaterial exceptions) and entered a cease and desist order against the defendant with respect to those activities found by the Administrative Law Judge to h ave been deceptive in connection with the sale of Koscot distributiorships and in violation of Section 45a of Title 15, United States Code. Because the cease and desist order was affirmed on appeal and is now final, *Turner v. F.T.C.*, 580 F.2d 701 (D.C.Cir. 1978), the findings of the Commission as to the material facts with respect to Glenn W. Turner's unfair or deceptive acts or practices are conclusive. 15 U.S.C. § 57b(c)(1). The issue now presented is whether the acts and practices of Glenn W. Turner to which the cease and desist order relates are ones which a reasonable man would have known under the circumstances were dishonest or fraudulent.

Acts and Practices to Which Cease and Desist Order Relates.

Glenn W. Turner was ordered to cease and desist from participating in marketing programs in which the financial gains to the participants are based on their recruitment of other participants. Glenn W. Turner was also ordered to cease and desist from misrepresenting the ease of recruiting or obtaining participants in sales promotion programs, from misrepresenting the anticipated cost of doing business, from representing that a merchandising program can make a participant financially successful, from misrepresenting the availability of products, and from misrepresenting the amount of money made from the sale of products and distributorships. The final cease and desist order proscribes Glenn W. Turner's participation in other similar related activities.

Findings by the Federal Trade Commission

In the Commission's final order to cease and desist, the Commission substantially adopted all findings of fact that appear in the initial decision of the Administrative Law Judge. Additional findings of fact by the Commission are contained in the *Opinion of the Commission* to which the final order to cease and desist is attached.

The findings of fact of the Federal Trade Commission reveal that Koscot Interplanetary, Inc. and Glenn W. Turner Enterprises, Inc. were the alter egos of Glenn W. Turner. Initial Decision, Finding of Fact No. 8 [hereinafter FF # 8]. Turner founded and controlled Koscot from August 1967 until August 1973 or later. FF 1, 3, 7-10.

The corporations controlled by Turner set up pyramid marketing schemes in which distributors and supervisors were led to believe they could recoup the money paid by them to Koscot by recruiting other distributors and supervisors. See e.g. FF 42, 43. Although the sales structure was set up ostensibly to market cosmetics, the system was designed so that the sale of distributorships was primarily encouraged. Distributorships were sold when no products were available, and the potential return from the sale of distributorships was misrepresented. FF 45. The continual recruitment of additional participants became impossible when the geometric progression exhausted the number of potential investors available in a given community. FF 46. Thus, promised profits from the sale of distributorships did not occur due to exhaustion of the number of people willing to invest. FF 48.

The record reveals many misrepresentations by Glenn W. Turner and the people he controlled. Koscot misrepresented the amount of money that could be made from the sale of distributorships and the number of distributorships that could be sold per year. FF 54, 55. The ease of recruiting beauty advisers and the market for cosmetics were misrepresented. FF 57, 58. Although Koscot represented that a distributor's annual product sales ranged from $50,000.00 to over $200,000.00, the national distributor averages were $1,125.00 in 1970, $1,733.00 in 1971, and $938.00 in 1972. FF 61. Glenn W. Turner rejected the suggestion that Koscot literature be revised to reflect actual retail sales experience of Koscot distributors as appeared on the Koscot books, and not the deceptive claims of huge retail sales. FF 64.

Koscot misrepresented its status in the marketplace. Koscot claimed to have sold $67,000.00 in retail cosmetics during its first month of operation and to have grown to sales in excess of $4,000,000.00 per month nineteen months after Koscot began operation. FF 66. In fact, no products were sold for many months after Koscot began operations, and Koscot retained considerably less than one percent of the cosmetic market throughout its history. FF 67. High pressure sales meetings following preconceived scripts created an emotionally charged atmosphere in which Koscot convinced investors that they would succeed if they purchased distributorships. FF 68. Success stories were fabricated or exaggerated, and large bills and checks were displayed to bolster the credibility of the success stories. FF 69.

Koscot misrepresented product availability. In fact neither Koscot nor any of its distributors had any product available for immediate sale for more than a year after Koscot was organized. FF 78. Turner selected officials on the basis of their ability to sell distributorships rather than to manage cosmetic sales. Product shortages were the predictable consequence of his selection of unqualified personnel. FF 81. Products sales were always subordinate to recruitment, and Koscot was primarily in the business of selling distributorships. FF 83, 84. The misrepresentations as to the availability of product, extent of advertising, training offered, and likelihood of success were knowing misrepresentations. FF 87. Glenn W. Turner falsely represented that anyone could achieve success in selling cosmetics, and distributorships were, therefore, sold to unqualified people. FF 99, 101, 106, 107, 109. Although Koscot promised to spend millions of dollars in advertising within two years to create consumer demand, Glenn Turner disapproved advertising expenditures for product recognition. FF 112, 115.

Turner was the alter ego of his corporations, and the "architect and prime mover" of Koscot's marketing scheme. FF 132. Turner knew that the Koscot wholesale operations was based on deception and fraud. FF 133, 134. Koscot's representation that any individual can recoup his or her investment by means of inducing others to invest is an "inevitably deceptive representation," and the Koscot plan has resulted in actual deception and consumer injury. *Opinion of the Commission* at 6.

Conclusion

The terms "dishonest" and "fraudulent" as used in Section 57b(a)(2) are not defined therein. The obvious purpose, however, of the section in which the criteria are found is to afford protection against deceptive practices which are not necessarily criminal. The legislative history indicates:

> It is not intended that the court in applying the statutory standard must find that a reasonable man under the circumstances would have considered such act or practice to be criminal.

S. Conf. Rep. No. 93-1408, 93d Cong., 2d Sess. (1974), reprinted in (1974) *U.S. Code Cong. & Ad. News* 7755, 7773. Acts which are fraudulent or dishonest for purposes of consumer redress should fall at least within the scope of the activities which would be deemed fraudulent for purposes of the mail fraud statute. 18 U.S.C. § 1341. Acts within the purview of that statute need only be reasonably calculated to deceive persons of ordinary prudence and comprehension. See *Blachly v. United States,* 380 F.2d 665 (5th Cir. 1967).

The findings of fact adopted by the Federal Trade Commission demonstrate that the conduct which was the subject of the cease and desist order was conduct which a reasonable man would have known under the circumstances was reasonably calculated to deceive persons of ordinary prudence and comprehension. This follows from the nature of the representations, their frequency, purpose and effect as found by the Commission. This court, therefore, concludes that no genuine issue of fact exists with respect to the liability of the defendant to redress injuries to consumers resulting from the unfair and deceptive acts and practices which were the subject of the cease and desist order. The motion for summary judgment will, therefore, be granted to that extent. There obviously exist issues of fact and law with respect to the amount and type of redress appropriate under the circumstances. Those, however, are the only issues remaining for adjudication.

CIVIL PENALTY CASES

RESPONDENTS—FTC ORDERS 1982

United States v. National Dynamics Corp. and Elliott Meyer—United States District Court for the Southern District of New York; consent decree in the amount of $100,000 for civil penalties was entered January 7, 1982, for alleged violations of a consent order and a litigated consent order, both of which prohibit certain practices in the advertising and selling of battery additives. (Dockets 7305 and 8803, 56 F.T.C. 21 and 82 F.T.C. 488, as modified by 85 F.T.C. 391).

United States v. Foremost-McKesson, Inc.—United States District Court for the Northern District of California; consent judgment in the amount of $175,000 for civil penalties was entered on February 5, 1982, for alleged violations of an FTC order prohibiting certain acquisitions without prior Commission approval. (*In the Matter of Foremost Dairies, Inc.*, Docket C-1161, 71 F.T.C. 56).

United States v. Phelps Dodge Industries, Inc.—United States District Court for the Southern District of New York; consent judgment in the amount of $100,000 for civil penalties and injunction entered on February 9, 1982, against one of the defendants, the Anaconda Co., for alleged violations of an FTC order prohibiting certain companies from fixing the price of impregnated paper cable. (*In the Matter of National Electrical Manufacturers Association et al.*, Docket 2565, 24 F.T.C. 306).

United States v. Talent, Inc. and Theodore Rosen—United States District Court for the District of Massachusetts; consent decree with no civil penalties, but containing an injunction, was entered April 11, 1982, for alleged violations of a consent order prohibiting certain practices in the advertising and selling of talent promotion schemes. (Docket C-2512, 83 F.T.C. 1528).

United States v. Van Schaack & Company—United States District Court for the District of Colorado; consent decree in the amount of $30,000 for civil penalties, and an injunction were entered May 11, 1982, for alleged violations of a consent order prohibiting certain practices in the offering of consumer credit. (Docket 2769, 86 F.T.C. 1526).

United States v. CPC International, Inc.—United States District Court for the Northern District of California; consent decree entered on June 7, 1982, against defendants CPC International, Inc., A.E. Staley Manufacturing Company, Standard Brands, Inc., American Maize-Products Company, Anheuser-Busch, Inc., and The Hubinger Company, for alleged violations of an FTC order prohibiting certain companies from fixing the price of corn derivatives. (*In the Matter of Corn Products Refining Co., et al.*, Docket 5502, 47 F.T.C. 587).

United States v. R.J. Reynolds Tobacco Co., Inc.—United States District Court for the Southern District of New York; consent decrees in the amount of $100,000 for civil penalties and an injunction were entered June 10, 1982 and December 3, 1981, for alleged violations of a consent order prohibiting defendant from failing to disclose the Surgeon General's health warning clearly and conspicuously in cigarette advertising. (Docket C-2184, 80 F.T.C. 455).

United States v. Gulf Coast Builders Exchange, Inc.—United States District Court for the Middle District of Florida; consent judgment in the amount of $30,000 for civil penalties entered on July 16, 1982, for violations of an order prohibiting boycott activities in connection with operation of a bid depository in the commercial construction industry. Docket C-2888, 89 F.T.C. 505).

United States v. Standard Educators, Inc. and James A. Melley, Sr.—United States District Court for the District of Connecticut; consent decree in the amount of $25,000 for civil penalties and an injunction were entered October 5, 1982, for alleged violations of a litigated cease and desist order prohibiting certain marketing practices in the selling of encyclopedias. (Docket 8807, 79 F.T.C. 858).

SPECIAL REPORTS 1982

United States v. Nanlo, Inc.—United States Court of Appeals, First Circuit; consent judgment in the amount of $6,330 was entered March 22, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Erie Coco-Cola Bottling Co.—United States District Court for the Eastern District of Pennsylvania; consent judgment in the amount of $3,000 was entered May 26, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Elgin Grain Co. —United States District Court for the Northern District of Ohio; consent judgment in the amount of $3,000 was entered June 2, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Packer Plastics, Inc.—United States District Court for the District of Kansas; consent judgment in the amount of $6,000 was entered June 7, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Ritchie Rubber & Plastic Co.—United States District Court for the Northern District of West Virginia; consent judgment in the amount of $5,000 was entered June 7, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Quinn Concrete Co., Inc.—United States District Court for the Western District of Missouri; consent judgment in the amount of $4,000 was entered June 23, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Altex Ready Mixed Concrete Corp.—United States District Court for the Middle District of Louisiana; consent judgment in the amount of $8,780 was entered June 30, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. San Lorenzo Lumber Co.—United States District Court for the Northern District of California; consent judgment in the amount of $3,500 was entered June 30, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Missouri Distributing Co.—United States District Court for the Western District of Missouri; consent judgment in the amount of $10,419 was entered August 1, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Jandy Textiles Corp.—United States District Court for the Southern District of New York; consent judgment in the amount of $1,000 was entered September 14, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Hattiesburg Coca-Cola Bottling Co.—United States District Court for the District of Mississippi; consent judgment in the amount of $2,300 was entered September 30, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Alexander Laufer & Sons, Inc.—United States District Court for the Southern District of New York; consent judgment in the amount of $5,000 was entered on October 15, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Chesson Oil Co., Inc.—United States District Court for the Western District of Louisiana; consent judgment in the amount of $3,000 was entered on October 22, 1982, for failure to file a special report in connection with the Quarterly Financial Reporting Program.

United States v. Plattsburg Foundry & Machine Co.—United States District Court for the Northern District of New York; consent judgment was entered October 28, 1982 for failure to file a special report in connection with the Quarterly Financial Reporting Program.

TRADE REGULATION RULES 1982

United States v. StarCrest Products of California, Inc.—United States District Court for the Central District of California; consent decree in the amount of $50,000 for civil penalties and an injunction were entered May 19, 1982, for alleged violations of the FTC's Trade Regulation Rule concerning Undelivered Mail Order Merchandise and Services, 16 C.F.R. § 435.

United States v. Collegiate Recovery & Credit Assistance Programs, Inc., and Jon V. Chase—United States District Court for the Northern District of Oklahoma; consent decree in the amount of $32,500 for civil penalties and an injunction were entered July 1, 1982, for alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

United States v. Avis Rent A Car System, Inc.—United States District Court for the Eastern District of New York; consent decree in the amount of $30,000 for civil penalties and an injunction were entered July 23, 1982, for alleged violations of the FTC's Trade Regulation Rule concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.

United States v. Hertz Corporation—United States District Court for the Southern District of Florida; consent decree in the amount of $70,000 for civil penalties and an injunction were entered July 23, 1982, for alleged violations of the FTC's Trade Regulation Rule concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.

United States v. Lender Service Incorporated—United States District Court for the Northern District of Oklahoma; consent decree in the amount of $10,000 for civil penalties and an injunction were entered September 9, 1982, for alleged violations of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, and its implementing Regulation B, 16 C.F.R. § 202.

United States v. Beall's Department Stores, Inc,—United States District Court for the Middle District of Florida; consent decree in the amount of $10,000 for civil penalties and an injunction were entered September 21, 1982, for alleged violations of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, and its implementing Regulation B, 16 C.F.R. § 202.

United States v. Consumer Finance Corporation and Richard M. DeMarco—United States District Court for the District of New Jersey; consent decree in the amount of $15,000 for civil penalties and an injunction were entered December 29, 1982, for alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

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